

**GOOD
NEWS**

**BAD
NEWS**

TREC LEGAL UPDATE

November 2013



SB 985 – Cities and Brokers

- Allows cities to list property with a broker as opposed to selling by open bid or auction
 - Must list property in listing service for at least 30 days

Auctioneers and Need for a Real Estate License – HB 3038

- Allows individual auctioneers to perform work for real estate companies in addition to auction companies
- Intended to clarify that auctioneer can sell real estate in an auction and can associate with a brokerage firm to show, contract, etc.

Condominiums – HB 2075

- Added to the powers of the condo assoc. the ability to borrow money & assign for collateral:
 - Assoc.'s right to receive assessments
 - Assoc.'s lien rights
- If unit owners must approve a loan, then only 67% is needed unless a lower amount is specified in the condo documents

Condominiums (cont.)

- Clarifies that the condo assoc.'s insurance may have commercially reasonable deductibles
- Existing law requires condo assoc. to repair a casualty loss promptly unless 80% of owners vote not to rebuild
 - Clarified that all owners can vote regardless if their unit has been damaged or not

Condominiums (cont.)

- If the cost of repair is less than the deductible the party who must pay for the repair is the party who would have had to pay if there had been no insurance.
- If the cost of repair to the association exceeds the deductible the dedicatory instruments dictate who pays
 - But if silent, the board determines by vote
 - And if the board does not determine, then it is a common expense
- If one owner(s) is responsible for loss, the association can assess the cost of deductible and repairs against the one owner(s).

Condominiums (cont.)

- If foreclosed (because of assessments), unit owner can redeem within 90 days
 - Calculating the redemption price differs slightly if the purchaser at the foreclosure sale is the assoc. or another person
 - See Page 4 for method of calculating redemption amount.

Property Owner Associations – HB 35

- HB 35 clarified that owner may use an adjacent lot for owner's residential purpose
 - HOA cannot adopt rule prohibiting use of adjacent lot
 - Owner must still comply with architectural controls
 - If owner sells, then lot has to go along with his house or the adjacent lot has to be restored

HOAs (cont.)

- HB 680 affirms HOA can regulate size, number, and location of flags
- Cannot prevent one flagpole per house that:
 - does not exceed 20 feet in the front yard; or
 - is attached to the residence
- Must still comply with zoning, easements, and setbacks

HOAs (cont.)

- SB 198 provides HOA may not stop owner from using drought resistant landscaping or water-conserving turf
 - Owner may have to submit detailed plan
 - HOA may not unreasonably deny the plan

Timeshares – SB 1372

- HOA statutes do not apply to timeshares
- SB 1372 created parallel standards for timeshares for the protection of owners

Real Estate Inspectors - SB 2911

- HB 2911 updated Inspector licensing statute
- Clarified fingerprinting, criminal backgrounds, late fee renewal provision, and other house-keeping matters.
- To return to active status, the inactive inspector must meet CE requirements and hands-on training

Inspectors (cont.)

- If required E&O coverage is not available, TREC may accept a bond as an alternative

Appraiser Disclosure – HB 585

- Licensed appraisers who appear before an ARB must disclose the capacity under which they appear before the ARB

Propane Distribution Retailers - HB 2532

- HB 2532 addressed a number of concerns related to Propane Distribution Retailers
- Distributer must make certain disclosures in real property records
- Owner is a distributor's district must provide a certain notice prescribed by the statute at the time of sale
 - Broker/Lawyer Committee adding form to TREC library



ADDENDUM FOR PROPANE GAS SYSTEM SERVICE AREA

(Section 141.010, Utilities Code)

CONCERNING THE PROPERTY AT _____
(Street Address and City)

NOTICE

The above referenced real property that you are about to purchase may be located in a propane gas system service area, which is authorized by law to provide propane gas service to the properties in the area pursuant to Chapter 141, Utilities Code. If your property is located in a propane gas system service area, there may be special costs or charges that you will be required to pay before you can receive propane gas service. There may be a period required to construct lines or other facilities necessary to provide propane gas service to your property. You are advised to determine if the property is in a propane gas system service area and contact the distribution system retailer to determine the cost that you will be required to pay and the period, if any, that is required to provide propane gas service to your property.

Buyer hereby acknowledges receipt of this notice at or before execution of a binding contract for the purchase of the above referenced real property or at the closing of the real property.

Section 141.010(a), Utilities Code, requires this notice to include a copy of the notice the distribution system retailer is required to record in the real property records. A copy of the recorded notice is attached.

NOTE: Seller can obtain a copy of the required recorded notice from the county clerk's office where the property is located or from the distribution system retailer.

Buyer Date Seller Date

Buyer Date Seller Date

The form of this addendum has been approved by the Texas Real Estate Commission for use only with similarly approved or promulgated forms of contracts. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate licensees. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (www.trec.texas.gov)

Regulatory Changes

Experience Required for Broker License

- 4 years experience needed in preceding 5 years of filing an application
- TREC adopted rules how to document the 4 years experience
 - Combines active licensure and transactional experience
 - 3600 points required (obtained before or within 1 year of filing application)
 - At least one transaction is required each year
 - See Page 7 for point calculations

Experience Requirement (cont.)

- Do not have to submit transaction documents to TREC but may have to produce them upon request
- Must be listed in transactional documents to receive credit
- If documents are not available, may be able to use affidavit

Licensees as Principals in Transactions

- If licensee is principal, then not acting as broker or salesperson
 - TREC may discipline licensee acting as principal if engages in misrepresentation, dishonesty, or fraud
 - Applies if acting for himself or name of spouse, parent, child, entity of which licensee owns more than 10%, or trust in which one of those is a beneficiary
 - Written disclosure of licensee's status in all these capacities should take place

Broker Price Opinions

- Parallel amendments that were made in TRELTA clarifying that a broker is not authorized to perform an appraisal, were made in the TALCB statute
 - Broker may perform BPOs and CMAs
 - Must include prescribed disclosure in BPO or CMA
 - TREC made conforming amendments in 535.16 and 535.17

Final Mortgage Rules / CFPB

- CFPB designed to govern financial credit markets and protect consumers
- In Jan. 2013 CFPB issued 3 rules of mortgage financing and escrow requirements
 - QM Rule: standards for ability to repay
 - HOEPA changes
 - Escrow account requirements for high-priced mortgages

QM Rule

- High Priced Mortgage Loans & Ability to Repay (ATR)
- To obtain QM status, lender must reasonably believe borrower has ability to repay. Must take into account:
 - Income & assets
 - Employment status
 - Loan payments
 - Insurance, tax and other debt payments
 - Alimony and child support
 - Debt-to-income ratio
 - Credit history

QM Rule (cont.)

- QM Mortgages must:
 - have max. year term (30)
 - Fixed rate for at least 5 years
 - Points and fees at about 3 percent or less
 - Periodic payments without negative amortization

QM Rule (cont.)

- Lender will follow a number of underwriting standards for QMs, for example:
 - Borrowers may have no more than one delinquent payment in the 12 months before applying for a loan and none in the 6 months before applying
 - Lender must verify borrowers income, assets, debts, and child support
 - Debt-to-income ratio may not exceed 43%

General Comparison of Ability-to-Repay Requirements with Qualified Mortgages¹

	ATR Standard	General QM Definition	Agency/GSE QM (Temporary)	Balloon-Payment QM	Small Creditor QM	Small Creditor Balloon-Payment QM (Temporary)
Loan feature limitations	No limitations	No negative amortization, interest-only, or balloon payments	No negative amortization, interest-only, or balloon payments	No negative amortization or interest-only payments	No negative amortization, interest-only, or balloon payments	No negative amortization or interest-only payments
Loan term limit	No limitations	30 years	30 years	No more than 30 years, no less than 5 years	30 years	No more than 30 years, no less than 5 years
Points & fees limit	No limitations	3%	3%	3%	3%	3%
Payment Underwriting	Greater of fully indexed or introductory rate	Max rate in first 5 years	As applicable, per GSE or agency requirements	Amortization schedule no more than 30 years	Max rate in first 5 years	Amortization schedule no more than 30 years
Mortgage-related obligations	Consider and verify	Included in underwriting monthly payment ² and DTI ³	As applicable, per GSE or agency requirements	Included in underwriting monthly payment ² and DTI ³	Included in underwriting monthly payment ² and DTI ³	Included in underwriting monthly payment ² and DTI ³
Income or assets	Consider and verify	Consider and verify	As applicable, per GSE or agency requirements	Consider and verify	Consider and verify	Consider and verify
Employment status	Consider and verify	Included in underwriting DTI	As applicable, per GSE or agency requirements	No specific requirement	No specific requirement	No specific requirement
Simultaneous loans	Consider and verify	Included in underwriting DTI	As applicable, per GSE or agency requirements	Included in underwriting DTI	Included in underwriting DTI	Included in underwriting DTI
Debt, alimony, child support	Consider and verify	Consider and verify	As applicable, per GSE or agency requirements	Consider and verify	Consider and verify	Consider and verify
DTI or Residual Income	Consider and verify	DTI ≤ 43 percent	As applicable, per GSE or agency requirements	Consider and verify	Consider and verify	Consider and verify
Credit History	Consider and verify	Included in underwriting DTI	As applicable, per GSE or agency requirements	No specific requirement	No specific requirement	No specific requirement

Appraisals and High Priced Loans

- Lender must use licensed appraiser who physically inspects property and files report
- Lender must give borrower free copy of the report
- Required to obtain 2nd appraisal if seller obtained property at a lower price within 6 months

Capital Gains Tax

- Gains for income tax filers above \$400/450 is at 20%, for those below that level the tax is generally at 15% (could be less)
- New investment income tax might also apply
- Medicare tax could also apply

Capital Gains

Investment Income Tax & Additional Medicare Tax

- Capital Gains exclusion on sale of residence remains same (\$250/\$500)
- But if seller's adjusted gross income exceeds \$200/\$250, then the 3.8% Investment Income Tax & the 0.9 Medicare Tax applies
 - The excess gain is added to seller's AGI and then seller elects a certain calculation to determine tax owed

Appraisal Management Companies

- TALCB adopted rules after the 2011 legislation concerning AMCs
- Rules define process to register and operate an AMC

AMCs (cont.)

- Rules provide AMCs :
 - Must adopt compensation policy, which complies with federal law and includes fees that are customary and reasonable
 - May not require appraiser to sign agreement stating that the fees are customary and reasonable
 - Must ensure appraisers' competency
 - Must review at least 5% of appraiser's work in accordance with the review standards in the rule

Business Entities in TRELA

- In 2011, legislation requires licensed business entity to have E&O insurance if the D.O. owns less than 10% of the entity
- D.O. must provide proof of ownership to TREC upon certain events and proof that the D.O. is an officer, manager, or general partner
- TREC has a certificate of proof of insurance that D.O. can show compliance with insurance requirement

Business Entities (cont.)

- If business entity receives compensation on behalf of a licensee or because of licensee's brokerage activity, the entity must be licensed
- Partnerships are business entities and must be licensed if performing brokerage activity.

Education Standard Advisory Committee

- ESAC is newly formed committee
- Function is to regularly review curriculum, course content, and instructor requirements
- Currently revising curriculum for all core courses
- Also currently working on alternative delivery courses

ESAC (cont.)

- ESAC intends to review
 - All core curriculum
 - Course fees and course approvals
 - Acceptability of alternative delivery methods
 - Alternative evaluation methods of mastery
 - Provider qualification
 - Instructor qualification

Justice Courts

- Small claims courts are now consolidated with the Justice Courts
- Supreme Court finalized its rules for implementation.
For example:
 - Eviction hearings must now be heard within 10 to 21 days after petition is filed (extended from 6-10), but that trial may not occur before 6 days after the citation has been served
 - Parties may be required to mediate in eviction proceedings (unless it would cause delay)
 - Generally now, the rules of evidence do not apply in eviction cases

Choice of Title Company

- Sec. 9 of RESPA
 - No seller...shall require DIRECTLY or INDIRECTLY, as a condition of selling the property, that title insurance be purchased BY THE BUYER from any particular title company
- General conclusion in Texas is that the choice of title company is negotiable
 - See bullets on Page 13

Choice of Title Company (cont.)

- Licensees ethical obligation is to not cause the failure of or problems in negotiations over the licensee's preferences
- If a party insists on a certain title company, licensee should only communicate preference & encourage consultation with counsel
 - For example: institutional sellers

Form 36-7; POA Addendum

- Legislature in 2011 modified law to permit buyers to obtain Subdivision Information in addition to owners
- Form 36-7 was modified accordingly

Walk Through 36-7

- Para. A defines Subdivision Information
 - Resale certificate
 - POA bylaws
 - POA rules
 - Subdivision restrictions
- All 4 items are to be delivered (by statute & contract)

Walk Through 36-7 (cont.)

- Parties will check one box under A(1)-(4)
 - (1) seller will get the Sub. Info. from the POA
 - (2) buyer will get the Sub. Info.
 - (3) seller has already given Sub. Info. to buyer
 - (4) Sub. Info. Is not required
- Under (1) or (2) buyer has right to review and maybe terminate
- Under (3) buyer has approved it, but buyer may choose to have it updated

Walk Through 36-7 (cont.)

- Note that only seller can request an updated resale certificate (statutory issue)
- If the parties request the title company to obtain the Sub. Info., and title company agrees, see bold notice about the fee
- Para. B requires notice of material changes in the Sub. Info. & gives buyer right to terminate if change is material and adverse

Walk Through 36-7 (cont.)

- Paragraph C allows parties to negotiate who will pay any transfer fees
- Paragraph D states that deposits and reserves are the buyer's obligation
- Paragraph E gives written authorization to POA to release information
- Paragraph E also addresses situation where title company needs updated information but the parties are not requesting it

Walk Through 36-7 (cont.)

- The cost of the Sub. Info. is supposed to be reasonable
- May need to make inquiry about cost before negotiating costs in the form

Mutual Termination Form

- Adopted in Feb. 2014 (??)
- Distinguished from 38-4, Notice of Buyer's Termination of Contract
- Both parties agree to terminate
 - Box 1 is a full release and agreement on disbursement of earnest money
 - Box 2 is a mutual termination and waiver of specific performance but not other remedies



MUTUAL TERMINATION OF CONTRACT

CONCERNING THE PROPERTY AT

(Street Address and City)

(Check only one box):

1. **Mutual Termination with Release of Earnest Money.** Buyer and Seller release each other, any broker, Title Company, and escrow agent from any and all liability under the above referenced contract between Seller and Buyer for the sale and purchase of the Property (Contract), and direct _____ (escrow agent) to disburse the earnest money as follows:

\$ _____ to _____

\$ _____ to _____

\$ _____ to _____

\$ _____ to _____

2. **Mutual Termination without Release of Earnest Money.** Buyer and Seller terminate the above referenced Contract and waive their rights to enforce specific performance of the Contract. [Except for claims for the earnest money, the undersigned Buyer and Seller release each other, any broker, Title Company, and escrow agent from any and all other liability and claims under the contract between Seller and Buyer for the sale and purchase of the Property.]

CONSULT AN ATTORNEY: TREC rules prohibit real estate licensees from giving legal advice. READ THIS TERMINATION CAREFULLY. If you do not understand the effect of this termination, consult an attorney BEFORE signing.

Buyer Seller

Buyer Seller

Address Address

Telephone: () _____ Telephone: () _____

Facsimile: () _____ Facsimile: () _____

E-mail: _____ E-mail: _____

Other/Cooperating Broker Listing/Principal Broker

By: _____ By: _____

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Can Emails create a Contract?

- Recent cases have raised question as to whether a lawyer's or broker's email can unintentionally bind a principal
- Generally 5 principles involved with question
 - UETA's purpose
 - Contracts and signatures in electronic form are enforceable
 - UETA's effect on law of contracts
 - Does not change law except to say that electronic form is enforceable as is ink and paper

Emails and Contracts (cont.)

- 5 principles (cont.)
 - What is the electronic signature
 - Can be almost anything, but must be the act of the person to whom it is attributed
 - Satisfaction of contract elements
 - All elements must be met to create binding contract
 - Authority of Broker (or sender)
 - Special agents generally do not have authority

Emails and Contracts (cont.)

- Licensees may want to make it clear in their emails that they cannot bind principal
 - “My statements in this email do not create an agreement for my clients.”
 - “My typed name in this email is not my electronic signature nor the electronic signature of my clients.”
 - “I do not have the authority to bind my clients to a contract.”

Dittman v Cerone

- Broker's email bound clients
- Negotiated sale of 1 property and buyer's wanted an option to purchase another property owned by the seller
- 3 emails were critical to the court's analysis
- Buyer's closed on purchase of first property understanding that they had option on second
- Court held buyers could enforce the emails as an option & satisfied statute of frauds

Trust/Property Mgmt. Funds

- TRELTA requires licensee to:
 - Properly account for or remit within a reasonable time after receiving trust funds
 - Not to commingle trust funds with other funds

Trust/Property Mgmt. Funds

- TREC's rules to clarify handling of trust funds
 - If broker holds trust money, then must have separate account (broker not required to hold trust money)
 - Salesperson may not have a trust account, but can be signatory on broker's trust account
 - Broker must clearly label the account as a trust account
 - Salesperson must immediately deliver funds if it is to be deposited in broker's trust account

Trust/Property Mgmt. Funds (cont.)

- TREC rules (cont.)
 - If funds are to be deposited with escrow agent, agent must deliver funds by close of business on 2nd day.
 - Broker cannot compel parties to be the escrow agent
 - May not commingle (with own or business accounts)
 - Broker holding money is a fiduciary and trustee for person entitled to the money

Trust/Property Mgmt. Funds (cont.)

- TREC rules (cont.)
 - Broker must properly account, which means:
 - To disburse if determinable
 - Interplead if not determinable
 - Require written releases if authorized
 - Remove any money from account that belongs to broker (earned fees; 30 days)
 - May keep small amount of broker's funds in account to cover fees

Trust/Property Mgmt. Funds (cont.)

- TREC rules (cont.):
 - Account may earn interest (not required), but
 - Broker must be able to make disbursements
 - Interest accrues to person who is equitable owner of funds
 - Broker does not have to have separate trust accounts for each client or purpose, but must have proper accounting
 - Must immediately notify all parties if a check bounces

Changing Sponsorship

- 2 ways to notify TREC of change of sponsorship
 - Via Paper Form
 - On-Line (RMT)
- Change of Sponsorship occurs
 - When changing brokers
 - When going from inactive to active
- Paper Notice requires new broker to sign, takes longer, & costs more
- With RMT, either agent or broker may initiate the change
 - By initiating a change, an invitation is sent
 - Change of sponsorship is effective when the recipient accepts the invitation.

Change of Sponsorship (cont.)

- Note that when an agent starts to work for a new broker, the agent and the broker must notify TREC within 10 days and request a new license
 - Agent may act for new broker when notice and fee submitted or mailed
- When terminating an association between a broker and agent, TREC will consider the sponsorship over when:
 - It receives the license returned; or
 - Request of sponsorship by a new broker

Change of Sponsorship (cont.)

- When an agent leaves a broker, the agent must notify the broker immediately in writing
- TREC notifies old broker if it receives request to sponsor from a new broker
- When a sponsorship ends, the old broker must notify TREC in writing that it has ended, or send the license (or a copy) back to TREC
- Procedure is different if salesperson license becomes inactive in the process

Scams seen on Craigslist

- Property advertised for lease (good deal)
- Purported landlord tells prospect to wire funds to secure the lease
- Purported landlord does not own property
- See FTC suggestions on Page 20

Form Changes

Form Changes

- In all contract forms (except where noted):
 - Property definition slightly reformatted
 - 6A(8) – Boundary Line Deletion to be negotiated
 - 6B – extensions for delivery of commitment should not go past 3 days before closing
 - Title Notices – Added Propane Gas Notice
 - 7D – “As Is” defined & slight formatting changes were made
 - 7F – repairs to be made by those who are commercially engaged in providing repairs

Form Changes (cont.)

- In all forms (cont.)
 - 7F – Extension of closing date for failure to have repairs done was decreased to 5 days
 - New paragraph added to Paragraph 7 concerning leases (partially moved from Paragraph 9). Seller may not lease after effective date
 - 14 – “or cause to be restored” added
 - 16 – boxes for mediation removed
 - 23 – 3 days to get option fee to Seller or listing broker
 - Formatting change on last page & admonition that brokers and agents do not need to sign last page

Form Changes (cont.)

- In 9-11 (Unimproved Property)
 - Excluded formatting change in Para. 2
 - 7E(1) was corrected to mirror same paragraph in the Farm & Ranch form
 - 7E(3) changed to read that seller is not aware of any environmental hazards that materially and adversely affect the property

Form Changes (cont.)

- In 23-13 (New Home – Incomplete)
 - Para. 2 was not reformatted
 - Para. 7 was not amended as other forms
 - Para. 7l(3) was changed in same way as Unimproved Property form
 - Para. 9 was changed by adding Seller will not lease property after effective date, but does not include other changes

Form Changes (cont.)

- In 24-13 (New Home – Complete)
 - 7H(3) includes same change as in the Unimproved Property form regarding environmental conditions
 - Para. 9 was changed by adding Seller will not lease property after effective date, but does not include other changes

Form Changes (cont.)

- In 25-10 (Farm & Ranch)
 - Para. 2 reservation clause changed
 - Last page was not changed
- In 30-11 (Condominium)
 - Deleted on 2B(3)
 - No changes in 6A(8)
- In 37-5 (HOA Addendum)
 - Minor change required by statute

Form Changes (cont.)

- In 40-5 (Financing Addendum):
 - Added paragraph for USDA Guaranteed Financing
- 47-0, New Form, Notice for Property in a Propane Gas Distribution Area (required by statute)

Case Studies

Ritchey v Pinnell

- The As Is clause does not automatically defeat the reliance elements for statutory fraud
- Seller's failure to disclose that remodel was made without necessary permits, when seller knew of lack of permits, allowed buyer to overcome trial court's summary judgment for seller based on the as-is clause & proceed to trial

Wu v Rhee

- Not paying a client a promised split of a licensee's commission (rebate) is a breach of the fiduciary duty of a real estate licensee.

Defterios v Dallas Bayou Bend, Ltd

- A broker can be held liable for ancillary losses to a party that could reasonably have been contemplated due to misrepresentations made by the broker.

El Dorado Land Company v City of McKinney

- A reversionary provision in a deed creates a property interest that is compensable if taken by the state.

Estate of Cunningham

- Spouses who want to convert separate property to community property must comply with all of the requirements of §4.203 of the Family Code including a specific agreement to convert one spouse's separate property to community and there must be evidence that the spouses received a fair and reasonable disclosure of the legal effect of the conversion.

Harris v Ebby Halliday Real Estate, Inc.

- Agents must exercise a standard of care that a prudent person would ordinarily exercise in securing property following a showing or they could be found negligent for subsequent events resulting from failing to meet that standard.

Simpson v Curtis

- The merger clause in a deed does not apply to parol evidence to establish that the failure to convey mineral interests in the deed when agreed to in the contract was a scrivener's error and a mutual mistake. A party is entitled to reformation of a deed to correct a mutual mistake made when reducing the terms of an original contract to writing to convey the property.

Smith Sales v Metal Systems

- If real estate is included in the listing agreement for the sale of business assets, a business broker who is not licensed by TREC may not maintain an action against the seller for commission.

Houston Unlimited, Inc. v Mel Acres Ranch

- Cured environmental damage can still create stigma, which can result in permanent damage due to lost market value.

839 E. 19TH STREET, L.P. VS. FRIEDSON

- Brokers should specifically list any prospects known (clients or properties, as applicable) under protection period provisions of listing or buyer representative agreements, especially if there has been contact prior to the date the listing or buyer representative agreement is signed.

RETFERFORD VS. CASTRO

- A professional real estate inspector qualifies for exemption under the DTPA when rendering an opinion, judgment or advice. Therefore claims on such matters cannot be brought under the DTPA but must be pursued on grounds of negligence or breach of contract.

LAWRENCE VS. KINSER

- A buyer's procurement of an independent inspection does not supersede a seller's failure to disclose a condition of the property as a producing cause for damages.

FULL DISCLOSURE