

HOUSE BILL REPORT

SHB 1487

As Passed House:
March 4, 2013

Title: An act relating to the real estate agency relationship.

Brief Description: Clarifying the terminology and duties of the real estate agency relationship law to be consistent with other existing laws.

Sponsors: House Committee on Business & Financial Services (originally sponsored by Representatives Parker, Kirby, MacEwen, Goodman, Kochmar, Upthegrove, Ryu, Angel, Maxwell and Bergquist).

Brief History:

Committee Activity:

Business & Financial Services: 2/7/13, 2/13/13 [DPS].

Floor Activity:

Passed House: 3/4/13, 98-0.

Brief Summary of Substitute Bill

- Modifies a number of definitions.
- Provides the statutory duties required in the real estate brokerage relationship supersede all, not just inconsistent, common law fiduciary duties owed by a principal to an agent.
- Makes a number of technical changes.

HOUSE COMMITTEE ON BUSINESS & FINANCIAL SERVICES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 15 members: Representatives Kirby, Chair; Ryu, Vice Chair; Parker, Ranking Minority Member; Vick, Assistant Ranking Minority Member; Blake, Chandler, Habib, Hawkins, Hudgins, Hurst, Kochmar, MacEwen, O'Ban, Santos and Stanford.

Staff: Jon Hedegard (786-7127).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Department of Licensing (DOL) is responsible for the licensing required for real estate transactions.

Real Estate Brokers and Managing Brokers.

Chapter 18.85 RCW addresses the licensing of the persons and entities that perform with real estate services. This chapter was overhauled in 2008 and included changes in terminology. The licensing of real estate brokers, managing brokers, designated brokers, and real estate firms replaced the previous licensing structure of real estate salespersons, associate brokers, and brokers.

Real Estate Brokerage Agency Relationships.

Chapter 18.86 RCW addresses the real estate brokerage relationships. Until 1996 the duties owed by a real estate broker or sales agent to a buyer, seller, landlord, or tenant were based on the common law of agency. Agency is a consensual relationship between two persons where one (the principal) empowers the other (the agent) to act, and the agent acts based on that authority. Agency relationships can be created expressly in writing, or by words or conduct. Conduct that determines an agency relationship in real estate sales and leasing includes paying a commission to the agent. Duties owed by an agent to a principal in a real estate transaction generally include loyalty: obedience, disclosure, confidentiality, reasonable care and diligence, and accounting. The scope of those duties evolved through the courts.

In 1996 the common law fiduciary duties owed by an agent were changed by the passage of the new chapter on real estate brokerage relationships. A number of duties concerning the relationship of an agent to the principal (buyer or seller, landlord or tenant) are set forth in statute. These statutory duties specifically superseded the common law rules applied to real estate licensees to the extent that they are inconsistent.

An agent may represent only the buyer or the seller unless otherwise agreed in writing. Absent an agreement, the agent represents the buyer. A pamphlet describing the statutory duties must be provided to all parties by the real estate agent before:

- any agency agreements or real estate offers are signed;
- a party consents to dual agency; or
- a party waives any rights that may be waived.

General Duties of a Licensee.

An agent is a licensee who has an agency relationship with a buyer or seller. Certain duties apply to licensees generally when performing real estate brokerage services as an agent, including the duty to:

- exercise reasonable skill and care;
- deal honestly and in good faith;
- present all written offers, notices, and other communications in a timely manner;
- disclose all material facts known by the licensee and not easily ascertainable to a party;
- account for all money and property received in a timely manner;
- provide a pamphlet on the law of real estate agency to all parties; and
- disclose what party a licensee represents, if any, in a real estate transaction.

These duties cannot be waived.

An agent need not conduct an independent investigation of the property or of either party's financial condition. The agent has no duty to verify any information the agent reasonably believes to be reliable.

Duties of an Agent.

Certain duties apply between an agent and a seller, an agent and a buyer, or in a dual agency relationship, including the duty to:

- be loyal by taking no action that would be adverse to the client;
- timely disclose any conflicts of interest;
- advise the client to get expert advice on matters relating to the transaction that are beyond the agent's expertise; and
- refrain from disclosing confidential information about the client except under subpoena or court order.

These duties cannot be waived. The only duty that can be waived is the duty to make a good faith and continuous effort to seek a buyer for a seller or a seller for a buyer. It is not a breach of duty to the principal for the agent, in the case of a seller, to show or list competing properties, or, in the case of a buyer, to show properties to competing buyers.

A licensee may represent both the buyer and the seller if all parties agree in writing. The consent to this dual agency must include the terms of compensation.

Duration of the Agency Relationship.

The agency relationship begins when the licensee performs brokerage services. The relationship continues until the licensee completes the services, the agreed upon period of service is ended, notice of termination by one party, or the parties agree to termination. Once the brokerage relationship is terminated, an agent is obligated to account for all moneys and property received and to keep appropriate information confidential.

Compensation.

Payment of compensation is not a factor in determining the existence of an agency relationship. A broker may be paid by any party to the transaction and may be paid by more than one party if the parties agree. A buyer's agent may be paid based on the purchase price without breaching any duty owed to the buyer.

Vicarious Liability.

A principal (buyer or seller) is liable for the actions of the agent (real estate licensee) only if the principal participated in or authorized the act, or the principal benefitted from the act and a court determines that no judgment could be enforced against the agent or a subagent. A licensee agent is not liable for the acts of a subagent unless the licensee participated in or authorized the act.

Imputed Knowledge.

There is no presumption of knowledge on the part of the principal (buyer or seller) of facts known by the agent or subagent of the principal.

Sanctions.

The Director of the DOL may impose sanctions on a licensee for violation of the laws governing real estate brokerage relationships.

Summary of Substitute Bill:

A number of changes are made to definitions in chapter 18.86 RCW to conform to the definitions in chapter 18.85 RCW. Broker is defined to include broker, managing broker and designated broker, as those terms are defined in the chapter providing licensing for real estate brokers and managing brokers. A definition of real estate firm (firm) is added. Firm means a business entity licensed by the DOL to conduct real estate brokerage services in this state. The definition of licensee is struck. Language changes are made throughout the act to conform to the changes in definitions.

The duties listed in chapter 18.86 RCW are statutory duties, not fiduciary duties. Chapter 18.86 RCW supersedes all, not just inconsistent, common law fiduciary duties owed by a principal to an agent.

The provisions setting forth the formatting of the pamphlet and briefly summarizing the required subjects in the pamphlet are modified to reflect the changes in this act and the 2012 addition of the duty of a firm representing the seller of owner-occupied real property in a short sale.

A citation is corrected. Numerous language changes are made.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill does three things. First, it reinforces existing law. Second, it clarifies the law governing real estate broker relationships. Third, the bill clarifies the duties owed by a licensee to a client. The bill is needed to update chapter 18.86 RCW and to clarify the duties of a licensee. This brings the definitions applied in chapter 18.86 RCW in line with the definitions used in chapter 18.85 RCW. Two words were accidentally omitted in the bill. We will ask for a technical amendment. A few years ago, a Court of Appeals stated that licensees still have common law fiduciary duties to clients. Chapter 18.86 RCW has been interpreted for years as providing the only fiduciary duties required of licensees. The statutes provide that any inconsistent common law fiduciary duties are superseded. The Washington Supreme Court correctly interpreted the law but used inconsistent terminology which has caused some confusion. The industry cannot find a single case where there is a common law fiduciary duty since chapter 18.86 RCW was passed in 1996. If a duty can be identified, now or in the future, it should be codified in chapter 18.86 RCW. The bill provides clarity to the consumers, licensees, and the legal community. It tells everyone exactly what the law is.

There are other common law provisions that are not superseded in the bill, negligence is an example. It only supersedes the possibility of any common law fiduciary duties. The statute provides duties and remedies. A consumer can bring suit for improper handling of funds. There is a duty of loyalty. If advice is bad, there may be a cause of action. There is no lessening of the duties required of a licensee. The bill says that a person may bring a suit based on the statutory duties but not on any common law duty. Issues involving dual agents are not changed. All tort laws remain. The bill would extinguish only duties that are not addressed in chapter 18.86 RCW. No such duty has been identified. There is no case law regarding any common law fiduciary duties that exist outside the statute. If any common law duty exists that is not addressed in chapter 18.86 RCW, the statutes should be amended to include it.

(Opposed) None.

Persons Testifying: Representative Parker, prime sponsor; Bob Mitchell and Annette Fitzsimmons, Washington Association of Realtors; and Justin Haag, Northwest Multiple Listing Service.

Persons Signed In To Testify But Not Testifying: None.