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COMMERCE AND TRADE

***Brokerage Relationships in Real Estate Transactions:
Provide Codification of the Relationships Between
Real Estate Brokers and Consumers of Brokerage Services***

CODE SECTIONS: O.C.G.A. §§ 10-6A-1 to -14 (new); 43-40-25 (amended)

BILL NUMBER: SB 227

ACT NUMBER: 314

SUMMARY: The Act defines the legal relationships between a real estate broker and the other parties to a real estate transaction, and establishes the duties and responsibilities, including disclosure requirements, of brokers in those relationships. The provisions of the Act may serve as a basis for a defense or a private right of action by real estate brokers, sellers, buyers, landlords, and tenants.

EFFECTIVE DATE: January 1, 1994

History

Historically, courts in Georgia defined an agent in a real estate transaction as a "fiduciary," under the common law of agency.¹ However, in practice, the real estate broker had no power to make decisions that bound his principal as could an administrator, executor, guardian, or other fiduciary, and did not operate under a power-of-attorney.² SB 227 is an attempt to codify the way relationships actually operate within the real estate industry and to distinguish the "limited agency" relationship in real estate transactions from common law agency.³

The bill was the product of a task force headed by Georgia Real Estate Commissioner Charles Clark and formed, one year before, to identify problems which might confront the industry in the next five to

1. *See, e.g., Dolvin Realty Co. v. Holley*, 48 S.E.2d 109 (Ga. 1948); *Welch v. Holley*, 382 S.E.2d 128 (Ga. Ct. App. 1989).

2. Telephone Interview with Quinton King, retired attorney, Task Force member and author of the bill (Apr. 23, 1993) [hereinafter King Interview]. Mr. King specialized in civil litigation in the area of real estate contracts and has been in the industry since 1948. *Id.*

3. *Id.* SB 227 was thus designed as a policy measure to promote stability in the real estate market by correcting misinterpretations of the relationship by both consumers and real estate brokers. O.C.G.A. § 10-6A-2(a) (Supp. 1993).

seven years.⁴ Concerned practitioners within the real estate industry were to study these problems and make recommendations to the Commissioner for resolution.⁵ Task force representation was diverse, including consumer and industry representatives, legislators, and members of the Governor's Office of Consumer Affairs.⁶ Defining the "agency" relationship appeared to be the most pressing matter to be resolved by the task force; misunderstandings of the nature and duties of real estate relationships were of concern to all sides.⁷

SB 227 was introduced into the General Assembly by freshman Senator and attorney Steve Farrow from the 54th District, and was co-sponsored by Senators Mary Margaret Oliver of the 42nd District and Pete Robinson of the 16th District.⁸ The bill was passed in the Senate without change.⁹ The changes adopted by committee substitute in the House Industry Committee and by floor amendment in the House were, for the most part, clarifications.¹⁰ The Act strikes a compromise between consumer advocates and industry representatives and is a good example of a cooperative effort by concerned groups to resolve issues of mutual concern.¹¹

SB 227

The Act amends title 10 of the Code by adding a new chapter 6A entitled "Brokerage Relationships in Real Estate Transactions."¹² Section 10-6A-3 of the Act provides a number of definitions which are critical to an understanding of the statute: 1) "Agency" is defined as "every relationship in which a real estate broker acts for or represents another by the latter's express authority in a real property transaction";¹³ 2) "Brokerage engagement" is defined as "an express written or oral contract" in which the client promises to pay, or acknowledges that the broker may receive from another party, a fee for "producing a seller, buyer, tenant, or landlord ready, able, and willing to sell, buy, or rent the property";¹⁴ 3) "Client" means "a person who

4. Telephone Interview with Keith Hatcher, Vice President of Governmental Affairs, Georgia Association of Realtors (Apr. 22, 1993) [hereinafter Hatcher Interview].

5. King Interview, *supra* note 2.

6. *Id.*

7. *Id.*

8. Telephone Interview with Sen. Steve Farrow, Senate District No. 54 (Apr. 21, 1993) [hereinafter Farrow Interview].

9. *Id.*

10. *Id.*

11. *Id.*

12. O.C.G.A. §§ 10-6A-1 to -14 (Supp. 1993).

13. *Id.* § 10-6A-3(a)(1) (Supp. 1993).

14. *Id.* § 10-6A-3(a)(4) (Supp. 1993).

has entered into a brokerage engagement with a real estate broker";¹⁵ and, 4) "Customer" is defined as "a person who has not entered into a brokerage engagement with a broker but for whom a broker may perform ministerial acts in a real estate transaction."¹⁶

The Act has two very important aspects.¹⁷ First, the Act identifies who or what the broker in a real estate transaction is, and outlines his or her duties. Second, the Act identifies the difference between a client and a customer.¹⁸

According to the Act, when a broker enters into a brokerage agreement with a client, a limited agency relationship is established between broker and client unless the contract between them states otherwise.¹⁹ Section 10-6A-4(a) of the Act provides: "A broker who performs services under a brokerage engagement for another is a limited agent, unless a different legal relationship between the broker and the person for whom the broker performs the service is intended and is reduced to writing and signed by the parties."²⁰ The client may be a seller, landlord, buyer, or tenant.²¹ The broker is acting as an independent contractor "employed" by the client to carry out the client's wishes to sell, buy, or lease a property.²² In most residential and commercial real estate transactions in larger metropolitan areas this limited agency relationship is the norm.²³

Section 10-6A-4(a) also requires that if the broker is acting in any capacity other than that of a limited agent, the broker must notify all parties to the transaction.²⁴ Similarly, if a broker's relationship to the parties should change, the broker must disclose that fact to all "brokers, customers, or clients involved in the contemplated transaction."²⁵ Furthermore, unless the broker enters into a brokerage agreement with a party, the Act states, there is a presumption that the party is a "customer," rather than a "client" of the broker.²⁶

15. *Id.* § 10-6A-3(a)(6) (Supp. 1993).

16. *Id.* § 10-6A-3(a)(8) (Supp. 1993).

17. King Interview, *supra* note 2. These aspects are stressed by the author of the bill, Mr. Quinton King. *Id.*

18. *Id.*

19. O.C.G.A. § 10-6A-4(a) (Supp. 1993).

20. *Id.*

21. *Id.* §§ 10-6A-5(a), -6(a), -7(a), -8(a) (Supp. 1993).

22. King Interview, *supra* note 2.

23. *Id.* This is due to the more competitive nature of the real estate industry in large metropolitan areas. *Id.* In smaller towns, where fewer real estate brokers are available, "dual agency" situations are more common. See *infra* note 60 and accompanying text.

24. O.C.G.A. § 10-6A-4(a) (Supp. 1993).

25. *Id.* § 10-6A-4(b) (Supp. 1993).

26. *Id.* § 10-6A-4(a) (Supp. 1993).

The new statute clearly disavows the common law agency concept of "fiduciary." The Act states that "[e]xcept as set out in this chapter, a limited agent shall not be deemed to have a fiduciary relationship with any party or fiduciary obligations to any party but shall only be responsible for exercising ordinary care in the discharge of its specified duties under the brokerage engagement."²⁷ The broker's duties to a party in a transaction depend on whether that party is a "client" or a "customer." The broker's duties to the client are the same (allowing for the differences in the transaction itself) regardless of whether the client is a seller, landlord, buyer, or tenant.²⁸

The broker's first duty to his client is to perform the terms of the brokerage agreement.²⁹ While the statute was enacted to govern the relationships between real estate brokers and consumers to the extent these relationships are not governed by individual written agreements,³⁰ the Act codifies brokerage relationships and duties as they have actually existed in the industry.³¹

Second, the broker has a duty to promote the interests of the client.³² This duty involves five aspects. The broker must seek a price for the property which conforms to the agreement or is acceptable to the client.³³ Note, however, once a property is under contract, the broker is not "obligated to seek additional offers" (or properties) for the client unless required by the brokerage agreement.³⁴ The broker must present all offers to the client in a timely fashion, and must disclose to the client material facts concerning the transaction of which the broker has actual knowledge.³⁵ In addition, the broker is required to advise the client to obtain expert advice in material matters which are beyond the broker's expertise.³⁶ Finally, the broker must account to the client in a timely manner for all "money and property received in which the [client] has or may have an interest."³⁷

27. *Id.*; see also *supra* note 2 and accompanying text.

28. The broker's duties when engaged by the seller are defined in O.C.G.A. § 10-6A-5. O.C.G.A. § 10-6A-5 (Supp. 1993). When engaged by the landlord the broker's duties are established in O.C.G.A. § 10-6A-6. *Id.* § 10-6A-6 (Supp. 1993). The broker's duties when engaged by the buyer are defined in O.C.G.A. § 10-6A-7. *Id.* § 10-6A-7 (Supp. 1993). The broker's duties when engaged by the tenant are enumerated in O.C.G.A. § 10-6A-8. *Id.* § 10-6A-8 (Supp. 1993).

29. *Id.* §§ 10-6A-5(a)(1), -6(a)(1), -7(a)(1), -8(a)(1) (Supp. 1993).

30. *Id.* § 10-6A-2(a) (Supp. 1993).

31. Hatcher Interview, *supra* note 4.

32. O.C.G.A. §§ 10-6A-5(a)(2), -6(a)(2), -7(a)(2), -8(a)(2) (Supp. 1993).

33. *Id.* §§ 10-6A-5(a)(2)(A), -6(a)(2)(A), -7(a)(2)(A), -8(a)(2)(A) (Supp. 1993).

34. *Id.*

35. *Id.* §§ 10-6A-5(a)(2)(B)-(C), -6(a)(2)(B)-(C), -7(a)(2)(B)-(C), -8(a)(2)(B)-(C) (Supp. 1993).

36. *Id.* §§ 10-6A-5(a)(2)(D), -6(a)(2)(D), -7(a)(2)(D), -8(a)(2)(D) (Supp. 1993).

37. *Id.* §§ 10-6A-5(a)(2)(E), -6(a)(2)(E), -7(a)(2)(E), -8(a)(2)(E) (Supp. 1993).

The broker's third duty to the client is to "exercise reasonable skill and care" in the performance of his or her duties.³⁸ This is, again, a codification of the actual practice in the industry, and replaces the fiduciary standard applied by the courts.³⁹

Fourth, the broker has a duty to comply with fair housing and civil rights laws as well as the requirements of this Act and other applicable statutes and regulations.⁴⁰

Having established the broker's duties to his client, the Act then describes what the broker is required to do for the customer—the party with whom the broker has no written agreement.⁴¹ The Act also describes what the broker is permitted to do for the customer without violating the brokerage agreement with the client.⁴²

The Act states that the broker must "treat all [customers] honestly and shall not knowingly give them false information."⁴³ In this regard, the broker must disclose "all material adverse facts" regarding the "physical condition of the property."⁴⁴ This includes disclosure of material defects and environmental contamination as well as "facts required by statute or regulation to be disclosed" which are known to the broker and which could not be discovered by "a reasonably diligent inspection" by the customer.⁴⁵

While the broker is not liable for innocently relaying false information if the false information was provided by the broker's client, the Act clearly states that it neither limits the seller-client or landlord-client's obligation to disclose all material adverse facts, nor the buyer or tenant's obligation to inspect the property.⁴⁶ Furthermore, the Act shields the broker from actions which arise from revealing information as required under this subsection of the Act.⁴⁷

In the performance of his duties to the client, the Act does allow the broker to assist the customer in performing "ministerial acts," that is, those acts that do not "require discretion" or the exercise of the broker's own judgment.⁴⁸ For example, if the client is a seller, the broker is

38. *Id.* §§ 10-6A-5(a)(3), -6(a)(3), -7(a)(3), -8(a)(3) (Supp. 1993).

39. Hatcher Interview, *supra* note 4; *see also supra* notes 2, 27 and accompanying text.

40. O.C.G.A. §§ 10-6A-5(a)(4), -6(a)(4), -7(a)(4), -8(a)(4) (Supp. 1993).

41. *Id.* §§ 10-6A-5(b), -6(b), -7(b), -8(b) (Supp. 1993).

42. *Id.* §§ 10-6A-5(c)-(d), -6(c)-(d), -7(c)-(d), -8(c)-(d) (Supp. 1993).

43. *Id.* §§ 10-6A-5(b), -6(b), -7(b), -8(b) (Supp. 1993).

44. *Id.* §§ 10-6A-5(b), -6(b) (Supp. 1993).

45. *Id.* §§ 10-6A-5(b), -6(b) (Supp. 1993).

46. *Id.* Similarly, if the client is a buyer or a tenant, this section does not limit that client's obligation to disclose to the seller-customer or landlord-customer all material adverse facts "concerning the [client's] financial ability to perform the terms of the [transaction]." *Id.* §§ 10-6A-7(b), -8(b) (Supp. 1993).

47. *Id.* §§ 10-6A-5(b), -6(b), -7(b), -8(b) (Supp. 1993).

48. *Id.* §§ 10-6A-3(a), -5(c), -6(c), -7(c), -8(c) (Supp. 1993).

allowed to prepare offers for a buyer and convey them to the seller, and to help the buyer locate lenders, inspectors, attorneys, schools and other services, without becoming an agent of the buyer.⁴⁹ In reality, conveying this information to the buyer is necessary to the completion of a successful transaction for the seller-client. The Act stipulates that performing these ministerial acts does not create a brokerage agreement with the buyer.⁵⁰ The Act also stipulates that, in this situation, the broker does not breach his duty to the seller by showing alternative properties to the buyer.⁵¹

In distinguishing between client and customer and describing the broker's duties to each, the new statute makes clear that "there is no automatic sub-agency" under the Act.⁵² That is, it is no longer presumed that a broker bringing a buyer to a property has a duty to the seller via the agency relationship of the seller with the listing agent.⁵³ A broker discloses in advance the party he represents. If he has entered into a brokerage engagement with a buyer, the broker has a duty to live up to the terms of that agreement. The broker's duties to the seller of the property are the duties of a broker to a "customer," not a "client."⁵⁴ This "buyer's agent" is a relatively new, and growing, phenomenon in the industry; the Act simply codifies it.⁵⁵

The Act also makes clear that before entering into a limited agency relationship with a seller, landlord, buyer or tenant, the broker is required to disclose to the prospective client "the types of brokerage relationships available"; any potential conflicts of interest; and the broker's fee arrangements, including splits with other brokers.⁵⁶ Furthermore, the client must be advised of any fee splitting arrangements the broker might enter into in the future.⁵⁷

Besides addressing the more common limited agency relationships, the new statute also addresses dual agency transactions.⁵⁸ A dual agency transaction is one wherein the broker enters a "brokerage relationship with both seller and buyer or both landlord and tenant in

49. *Id.* § 10-6A-5(c) (Supp. 1993).

50. *Id.* §§ 10-6A-5(c), -6(c), -7(c), -8(d) (Supp. 1993).

51. *Id.* § 10-6A-5(d) (Supp. 1993). Similarly, if the client is a buyer or tenant, the broker does not violate his duty to the client by offering a property in which the client is interested to other prospective buyers or tenants. *Id.* §§ 10-6A-7(d), -8(d) (Supp. 1993).

52. King Interview, *supra* note 2.

53. *Id.* In pre-Act practice, when a property was listed for sale, a broker bringing a buyer to the property was considered a "sub-agent" of the listing broker with a duty to the seller as the payer of the commission. *Id.*

54. See *supra* notes 43-51 and accompanying text.

55. King Interview, *supra* note 2.

56. O.C.G.A. § 10-6A-10(a) (Supp. 1993).

57. *Id.* § 10-6A-10(b) (Supp. 1993).

58. *Id.* § 10-6A-12 (Supp. 1993).

the same transaction.⁵⁹ Dual agency transactions account for approximately thirty-five percent of all real estate transactions, and an even higher percentage in small towns.⁶⁰ The Act does not prohibit a broker from acting as a dual agent, it merely requires full disclosure and the written consent of all clients.⁶¹ This, in effect, codifies existing practices and strikes a compromise between consumer advocates and industry.⁶²

The only significant change between the original draft of the bill in the Senate and the final House version was in the area of dual agency. The Act states that if after disclosure a client refuses to consent to a dual agency, the broker may withdraw from representing that client without liability and may continue to represent the other client in the transaction.⁶³ The original draft of SB 227 allowed the broker to refer the departing client to another broker and to collect a referral fee from that broker.⁶⁴

Both the House version and the final Act forbid referral fees under such circumstances.⁶⁵ Representative Jimmy Skipper from the 137th District, who ushered the bill through the House, insisted on the change.⁶⁶ According to Representative Skipper, allowing a referral fee in such circumstances would perpetuate the conflict of interest, not eliminate it. For an attorney such a referral fee would violate ethics laws.⁶⁷ The change was readily accepted and, according to the bill's author, the change "bettered the bill."⁶⁸

The Act addresses the issue of termination of brokerage relationships as well. While the brokerage relationships defined in sections 10-6A-4 to -8 begin when the client engages the broker, brokerage relationships end either when the broker has completed his performance, or upon expiration of the agreement of the parties.⁶⁹ If the agreement is silent and the matter has not been completed, the Act stipulates that the relationship terminates after one year.⁷⁰ After the relationship with

59. *Id.* § 10-6A-3(9) (Supp. 1993).

60. Farrow Interview, *supra* note 8. This is due to lack of market competition in smaller geographical areas. *See supra* note 23.

61. O.C.G.A. § 10-6A-12(a)(1)-(6) (Supp. 1993).

62. Farrow Interview, *supra* note 8.

63. O.C.G.A. § 10-6A-12(e) (Supp. 1993).

64. SB 227, as introduced, 1993 Ga. Gen. Assem.

65. O.C.G.A. § 10-6A-12(e) (Supp. 1993).

66. Hatcher Interview, *supra* note 4.

67. *Id.*

68. King Interview, *supra* note 2. According to Quinton King, allowing a referral fee in such instances was not part of the first draft of the bill. *Id.* In fact, Mr. King said, a large minority of the task force had objected to a referral fee under such circumstances and had expressed concern over its inclusion in the final draft. *Id.*

69. O.C.G.A. § 10-6A-9(a)(1), (2)(B) (Supp. 1993).

70. *Id.* § 10-6A-9(a)(2)(C) (Supp. 1993).

the client has ended, the Act states that the broker's only duty besides confidentiality is "to account for all moneys and property relating to the engagement."⁷¹

Finally, the Act amends Code section 43-40-25 relating to violations by real estate licensees, real estate schools, and instructors. This section prohibits real estate licensees, schools, and instructors from accepting, or giving "any undisclosed commission, rebate, or direct profit" in the procurement of loans or insurance, or for conducting property inspections related to the transaction.⁷² Further, the Act prohibits these persons from "acting for more than one party in a transaction without the express written consent of all parties to the transaction,"⁷³ or failing to seasonably disclose to all parties "any agency relationship that the licensee may have with any of the parties."⁷⁴

According to the bill's author, SB 227 as passed represents a "good, fair description of the real estate broker's duties and responsibilities to the client as well as his duties and responsibilities to the customer."⁷⁵ The Act's provisions will, no doubt, be incorporated into written brokerage agreements offered by real estate brokers throughout the state.⁷⁶ In addition, the Act is already drawing interest from other states and could serve as a uniform bill on the subject of brokerage relationships in real estate transactions. As a uniform bill, the balance toward customer or client could be shifted to fit the differing needs of the enacting states.⁷⁷

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71. *Id.* § 10-6A-9(b)(1)-(2) (Supp. 1993).

72. *Id.* § 43-40-25(6) (Supp. 1993).

73. *Id.* § 43-40-25(22) (Supp. 1993).

74. *Id.* § 43-40-25(31) (Supp. 1993).

75. King Interview, *supra* note 2.

76. *Id.*

77. *Id.*