

2011 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1430

2011 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1430
January 24, 2011
13311

Conference Committee

Committee Clerk Signature *Ellen Letang*

Explanation or reason for introduction of bill/resolution:

Relating to definitions and the duties of real estate brokerage firms

Minutes:

Chairman Keiser:

Representative Scott Louser~District 5-SW Minot: (see attached testimony).

Representative Ruby: In the last example of multiple buyers, is it possible for someone to say that it doesn't matter to me or would they almost always prefer to have someone else representing them?

Scott Louser: It puts the decision making into the buyer's hands. In almost every case I would have to assume one or both buyers would say, refer me to someone else.

Representative Ruby: If you are contacted by someone who wants to buy a house, if you find a house that fits that description that is for sale by the owner and you contact them. Under existing law, are you forced to represent that seller?

Scott Louser: First thing to determine is, who does that agent represent? If I'm contacted by a buyer that says, here are my parameters, go out and find property for me, as the perceived buyer/agent, I would want a buyer/broker agreement with them that says that I represent the buyer. Now I represent the buyer's best interest and it is my job to go and find the property, sale from owners. If have a copy of the form that would need to be signed by the seller, no, I would not go in and list, we would exclusively represent the buyer. The seller would become a seller customer which is exactly what this bill address and what my duties to that seller customer. I would disclose to the seller, I represent the buyer, so don't tell me any confidential information because I will tell my client. My duties to you are going to disclose material facts that I'm aware of, to be honest and the customary act. In that case I would be representing the buyer and the seller would be a seller customer and we are now defining my duties to the seller customer unless the seller says, I want you to represent me as well. Then we are entering what is called a dual agency, then I have to have permission from the buyer which limits my ability to negotiate for either party.

Representative Kreun: If you represent the buyer and seller, do you get paid by both.

Scott Louser: When you represent a buyer, you are either paid under a compensation agreement from the buyer directly or almost in every case the buyer/agency agreement discloses that you are going to be asking the seller for compensation. The reason is that most mortgage products for a buyer/agent to be compensated. The buyer/agent would go in and meet with the seller, disclose who they represent and have a compensation agreement with that seller with that particular transaction.

Representative N Johnson: On page 4, subsection 3, are you washing hands?

Scott Louser: This bill says to discover defects of the property, not disclose. That is the almost exclusive area of expertise for home inspector or appraiser. If there are defects that we are aware of and they are adverse material facts to the transaction to the property, yes that needs to be disclosed. Verify ownership is the obligation of the title company and to independently verify accuracy or completeness of any statement gives the opportunity to hire an attorney to verify if statements are accurate.

Representative N Johnson: On line 16, "unless agreed upon writing", can a buy, client or your customer say, I want you to do this for me and that is something that you agree ahead of time, what does that mean when that phrase is put in there?

Scott Louser: Yes, unless otherwise agreed would obligate whatever that additional request of your client is for you to perform their not customary to the transaction. I will highly recommend an inspection.

Chairman Keiser: You mentioned adverse material affects, do you not have to disclose those kinds of adverse material affects? Does this section get you out of that responsibility?

Scott Louser: No, that would fall under reasonable care and that is the duty of the client.

Chairman Keiser: We have reasonable care in a different section and now we put this in, so the question is, isn't this potentially a loophole, it will go to court.

Scott Louser: A good real estate agent/broker, I'm going to turn that over to an attorney and the attorney for the North Dakota Realtor Association is here and I may have him address that question.

Representative Nathe: Clearing up of this language, is this something within your industry nationwide that there is a movement?

Scott Louser: The definition of customer came from Idaho. The imputed knowledge portion came from SD and Iowa. So, this is a combination of other states. This bill has 3 features; definition customer, imputed knowledge and multiple offers. The multiple offers was generated from our state.

Representative Kreun: What I run into consistently, when a piece is sold and the individual doesn't realize of zoning next to that property is different, the answer is always is my realtor said that wasn't going to happen. What responsible is to the realtor?

Scott Louser: That comes up in industry a lot, my realtor. The first question I ask is, was that person that you claimed is your realtor, your realtor? Did you have an agency agreement in writing to represent you, if you did, you are their client, yes, they have these fiduciary duties. You didn't have an agreement with them and you were a customer, you choose not to be represented, they are no longer your realtor.

Representative Kreun: Basically it's a written agreement that binds the realtor to those facts.

Scott Louser: Yes, representation and compensation are mutually exclusive.

Representative Sukut: Is a customer a potential client?

Scott Louser: Yes, a customer is a potential client. Follow up question would be can a client go backwards to be a customer and the answer is no. You have potential confidential information.

Representative Sukut: Are there deals closed with the customer never becoming a client?

Scott Louser: Percentages I don't know, but I can give examples. If a licensee is doing their job properly and they disclose how agency works. One would assume that anybody would say that they want representation, especially when it doesn't cost money. In the event if that would become a dual agency situation and some doesn't agree to that in writing, someone has to be referred out.

Representative Boe: What would happen in a case where you as a broker represent me to purchase a house and dispose my other house, where would that put you?

Scott Louser: That is two different transactions and the relationship status would not change, one representing you as a buyer and one as a seller.

Chairman Keiser: Anyone here else in support of HB 1430.

Clause Lemke~North Dakota Association of Realtors: We have our attorneys here. We came across with several items. I would like the real estate commission speak and our attorney. We have a couple of small amendments.

Pat Jergenson~Executive Director of North Dakota Real Estate Commission: Speak to support of HB 1430 and the amendment will be brought to you by Casey Chapman. The commission is in favor to this bill as amended.

Chairman Keiser: You are protecting the citizens in the state of North Dakota, we are allowing for agents and agencies to enter into multiple agreements with multiple parties,

what was the thought process in recognizing the potential conflict of interest as a professional organization. Once an attorney is representing one side, the firm cannot represent the other side. I understand the intent, but from a professional standpoint, what is the discussion from the realtors, why is it ok for you and not other professions?

Pat Jorgenson: We believe and it's clear in the law what the fiduciary duties are and the licensees will still be required to honor those duties. If not the consumer should come to us with a complaint and we will deal with their license.

Chairman Keiser: It seems impossible to disclose from a fiduciary standpoint.

Pat Jorgenson: Each licensee has the duty of confidentiality and issues cannot be discussed.

Chairman Keiser: I have a fiduciary responsibility too. That is why I think there is a problem, I have two duties. I'm surprised that you group even have some concerns, law firms not question about it, just doesn't happen because of this very issue.

Pat Jorgenson: In the case of dual agency, an agent would explain to both parties that they have limited information that they can share, the confidentiality issue and foresee that that would be the same thing in multiply offers.

Chairman Keiser: I understand that but then they can't be performing their fiduciary responsibility.

Casey Chapman~Attorney for North Dakota Association for Realtors: I will address a couple of issues that have come up and see what I can do. First issue, dual agency, when one looks at existing law in North Dakota, was brought it as accepted with disclosure. If you look at page 4, line 2, we did not to create, we revised. One might ask how can one be a dual agent, the way it's been addressed by the Real Estate professions is with the idea of disclosure. In this bill it becomes clear; we have now added another disclosure. We require disclosure at the outset of the transaction. Both clients are told that in fact this turns up into a dual agency, there are certain thing we can't do not do for you that we can do for you now. We have disclosure forms for dual agency, that say to the clients, that if we go into a dual agency, there could be things that I know about my seller/client's motivation that in actuality I can't tell you as my buy/client. We have done one other and it's called a pointed agency. This started in Maine and in 1995 was the 2nd state in the country to authorize what is called a pointed agency. That is another alternative for brokers, buyers and seller where you can actually designate certain agents to represent certain sellers and certain agents to represent buyers. The ultimate answer is we have disclosure, pointed agency and most important thing is in North Dakota, by our form and rules of the real estate commission, nobody goes into dual agency without their consent. If a buyer says, wait a minute, you been representing me, don't tell me that you can't now help me 100% unless that buyer consents to the dual agency. The buyer has a right to back away from the deal and we will find somebody new.

Representative N Johnson: You are our client; you can go back to be a customer.

Casey Chapman: I wouldn't call it going back to a customer; it's limited in certain areas. I understand the question and it goes back to how does it work in practice? In practice I still represent the sell and the buyer; I told both of them, that as long as the two of you are coming together, at that point, my ability to do everything I could for you is going to be limited.

Representative N Johnson: What happens if I as the seller, wait a minute, you are not going to do me total justice, how do I break that contract, go elsewhere, if I don't want to agree to that dual agency.

Casey Chapman: The way that it's approached is at the outset. They have a chance at the outset to look into the future and are you willing to do that. We try to do everything up front, our disclosures, agreements and the consents before we get to the problem so nobody gets surprised.

Chairman Keiser: I will hold this bill and ask you groups to have the discussion. Obviously, a single attorney can represent both parties in a divorce. A buyer and a seller can easily enter into the same relationship as a divorced couple, but two buyers are where I have the problem. Two buyers and representing both buys fairly and I can explain up front, but what happens here that is different is that if I represented only one of them, I came upon some information, I could share that with them if I only represented on one. If I represent both, it's different. From a professional standpoint, you want to make sure you are not creating a problem. The second area, on subsection 3, on page 4, this is getting you out of any responsibility for adverse facts. I see that as a potential loophole.

Casey Chapman: The language was chosen intentionally to use the word discover, there already exists within the rules of the North Dakota Real Estate Commission, a very clear mandate that says that if you know about any materials facts on the property, you are required to disclose them to both parties. It is an agency law that is common in the education process. The one thing we stress, it doesn't matter whether you are working with a client and customer, the other side is represented. The one catch all, overall, if you know about adverse material facts you have an obligation. The distinction is simply is discover, do I need to discover it or do we actually say that's in the realm of inspectors. If we know about it, there is no doubt, you must disclose it.

Chairman Keiser: I understand and accept that and I understand the notion of discover, that is the heart of the problem. There are adverse material facts that I should have known, I quite doing my job, I don't discover them and I'm cleared. I don't know them, I'm exempt.

Casey Chapman: What we talk about defects in property. If an agent has said anything, at that point in time, now we have a misrepresentation and there is nothing in this law that protects that. In fact, the last line in paragraph 3, page 4, if the licensee or the firm is saying it, clearly the licensee and the firm is right up front. There are a couple of amendments, as we went through; we did notice a couple of items. The first proposed amendment would be on page 3 line 15, strike person and put in individual. The other proposed amendment would be on page 5, line 14, the use of the word of may, change it to do. Then we are consistent with proposed amendment on page 5, line 1, it says, do not breach, it would make the same wording down on line 14 as line 1.

Representative N Johnson: Back to the amendment pg 3, line 15, take individual out, my understanding from Legislative Council standing that a person can be a company as well as an individual.

Casey Chapman: That's correct.

Chairman Keiser: We have those amendments on the bill, what are the wishes of the committee?

Representative N Johnson: Move the adoption of the 2 amendments.

Representative Vigesaa: Second.

Voice vote taken, motion carried.

Chairman Keiser: Anyone else here to testify in support, in opposition, neutral of HB 1430. Closes the hearing on HB 1430.

2011 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1430
January 24, 2011
13313

Conference Committee

Committee Clerk Signature

Ellen Letang

Explanation or reason for introduction of bill/resolution:

Relating to definitions and the duties of real estate brokerage firms

Minutes:

Chairman Keiser: Opens the work session on HB 1430.

Claus Lembke: Over lunch I had forgotten an issue that the Real Estate Commission appointed a task force to look agency law in general in dual and appointed agencies. When you said that privately that we shouldn't have any dual agency, Representative Louser said that he would support that and make it all appointed in each case. We are looking at it and looking for some time, not to be included in this session.

Chairman Keiser: Again, we are talking about that one particular issue of if you are a customer or a client and the dual versus appointed agency and the only problem I say was when you had two buyers that you were working on the same property.

Claus Lembke: This allows you to represent to. This is occasionally the problem, you don't tell the other side and you have to in today's law.

Chairman Keiser: This does have the requirement for disclosure in it, so that is a positive step.

Chairman Keiser: What are the wishes of the committee?

Representative Ruby: Do Pass as Amended.

Representative N Johnson: Second.

Roll call for a Do Pass as Amended on HB 1430 with 5 yeas, 9 nays, 0 absent. The motion for a Do Pass as Amended fails.

Chairman Keiser: Members, would you object to holding this bill for a little bit and let's see if we can have a little discussion. I think this disclosure is important regardless if we have appointed or dual agency.

Representative Ruby: I thought it was important to identify the customer.

Chairman Keiser: This bill has a lot of merit and we will have more discussion on it.

2011 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1430
January 25, 2011
13363

Conference Committee

Committee Clerk Signature

Ellen Letang

Explanation or reason for introduction of bill/resolution.

Relating to definitions and the duties of real estate brokerage firms

Committee Work Session Minutes:

Chairman Keiser: This is the realtor's rewrite. Claus Lembke, do you have any further input?

Claus Lembke: I did talk with leadership and we recognize the difficulty on protection on section 5, page 4, may give us too much protection. We are not uncomfortable with removing the entire section 5.

Chairman Keiser: That is representing the two buyers.

Lembke: Correct.

Chairman Keiser: So it would make it illegal to represent 2 buyers?

Claus Lembke: Just leave the law alone or leaves it silent.

Rick Engebretson: All of section 5.

Claus Lembke: Our leadership is ok with that.

Representative Ruby: That continues with what we currently have where we still can, there is just no disclosure of it, correct?

Chairman Keiser: Committee members, it's up to you.

Representative Frantsvog: The suggestion is actually section 2, number 5, on page 4.

Chairman Keiser: Correct.

Representative Ruby: Moves a Do Pass as Amended on HB 1430.

Representative N Johnson: We didn't amend any further.

Chairman Keiser: Yes.

Representative Ruby: The disclosure part what important, otherwise, they could still represent the parties, they just don't have to tell them.

Representative Vigesaa: Second.

Chairman Keiser: Further discussion?

Representative Nathe: Is 5 staying in?

Chairman Keiser: At this point 5 is staying in.

Roll call was taken on HB 1430 for a Do Pass as Amended with 10 yeas, 4 nays, 0 absent and Representative Frantsvog is the carrier.

January 26, 2011

VR
1/26/11

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1430

Page 3, line 15, remove the overstrike over "~~person~~"

Page 3, line 15, remove "individual"

Page 3, line 15, overstrike "who" and insert immediately thereafter "that"

Page 5, line 14, replace "may" with "do"

Renumber accordingly

Date: Jan 24 - 2011

Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1430

House House Industry, Business and Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Motion Made By Rep Johnson Seconded By Rep Vigesaa

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative Frantsvog			Representative M Nelson		
Representative N Johnson					
Representative Kreun					
Representative Nathe					
Representative Ruby					
Representative Sukut					
Representative Vigesaa					

voice^{vote} motion carried

Total Yes _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

*p. 3 line 15
p. 5 line 14*

Date: Jan 24-2011

Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1430

House House Industry, Business and Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Motion Made By Rep Ruby Seconded By Rep Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser		✓	Representative Amerman		✓
Vice Chairman Kasper		✓	Representative Boe		✓
Representative Clark		✓	Representative Gruchalla		✓
Representative Frantsvog		✓	Representative M Nelson	✓	
Representative N Johnson	✓				
Representative Kreun	✓				
Representative Nathe	✓				
Representative Ruby	✓				
Representative Sukut		✓			
Representative Vigesaa		✓			

Total Yes 5 No 9

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

motion failed

June 25 - 2011

Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1430

House House Industry, Business and Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Motion Made By Rep Ruby Seconded By Rep Vigesaa

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser		✓	Representative Amerman	✓	
Vice Chairman Kasper	✓		Representative Boe		✓
Representative Clark	✓		Representative Gruchalla		✓
Representative Frantsvog	✓		Representative M Nelson		✓
Representative N Johnson	✓				
Representative Kreun	✓				
Representative Nathe	✓				
Representative Ruby	✓				
Representative Sukut	✓				
Representative Vigesaa	✓				

Total Yes 10 No 4

Absent _____

Floor Assignment Rep. Frantsvog

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1430: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1430 was placed on the Sixth order on the calendar.

Page 3, line 15, remove the overstrike over "~~person~~"

Page 3, line 15, remove "individual"

Page 3, line 15, overstrike "who" and insert immediately thereafter "that"

Page 5, line 14, replace "may" with "do"

Renumber accordingly

2011 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1430

2011 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1430
March 14, 2011
Job # 15341

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to definitions and the duties of real estate broker firms

Minutes:

Attachment: #1

Senator Klein: Meeting called to order this 14th day of March 2011 on HB 1430 at 9:00 am. Clerk calls the roll.

Clerk: 7-0-0

Representative Scott Louser: District 5 of Minot. He is a realtor from Minot, owner of Prudential Real Estate, Vice President of the National Association of Realtors in charge of government affairs. I am here to introduce HB 1430 and have our legal counsel, Casey Chapman and Government Affairs Director Clause Lemke to testify. I am pleased to introduce this bill as it became a discussion within the committee as "what if's"....there was a lot of discussion and turned into more of a discussion rather than testimony. This bill addresses three areas of practice of the real estate industry and has the support of all eight local associations, local boards of realtors, the state association realtors, the regulatory body, and the real estate state commission. The three areas addressed include an actual legal definition of the term "customer", the concept of imputed knowledge, and disclosure of occasional multiple customers under a contract to purchase the same property.

Senator Klein: The idea to bring the bill forward was something your organization has discussed or were there some issues? Why are we looking at this today?

Rep Scott Louser: Every year, the incoming president of the board of realtors does round table discussions with each association and each local board. The combination of the real estate commission.....who was essentially looking at agency law and dual agency and customer versus the client. So the combination of work group set up by the real estate commission (over two years ago) and the president of the association doing the round table discussions with brokers and boards brought this together. This is a collaborative effort all the state.....wasn't one single entity.

Senator Klein: Did you take care of all the "what if's"?

Rep Louser: I attempted to.....the "what if's" weren't as much technicalities in the bill as they real live scenarios where representative on the committees. There wasn't any discussion on the floor, but a lot of discussion if I were buying a house, how would it affect me? There weren't technicalities in the bill.

Senator Murphy: I am interested in the ramifications in the definition of how it affects peopleimputed knowledge.....let me know what this means.

Rep Louser: Imputed knowledge is a concept that years ago made more sense when there was not buyer agency. Years ago, prior to 1995, every licensee in ND represented a seller....you either listed the property and represented the seller directly or you were considering a sub-agent of the seller working in theory with the buyer customer, not a client. Client is a customer....you hear this in the testimony. No fiduciary duties owed to a customer. Under that scenario, it was presumed that everybody in the firm knew everything about every transaction because everybody represented the seller. Today's world, that can't possibly be the case because imputed knowledge implies that the broker and all agents know all information going on in a transaction. You can't possibly have that nor would you want that in a large firm where you may have agents representing buyer that shouldn't know everything that is going on in someone else's transaction.

Senator Murphy: This is bill is to do away with an old standard?

Rep Louser: Imputed knowledge is not in code, it is implied, so we are saying the concept of imputed knowledge should be restricted only to the specific transaction party that the principles to that transaction. Not everyone is expected to know everything.

Senator Klein: Question? Anyone else in support of HB1430?

Claus Lemke: Director of ND Association of Realtors. We went throughout the state and had each of the eight local board of realtors; we have round tables, and encourage them to bring us their issues. With us today is a member from the ND Realtor Commission, Jerry Schlosser. He was the chairman for the committee and worked closely with him as a joint effort to bring these issues before you.

Senator Klein: Questions:

Senator Andrist: Most transactions now there are 2 realtors involved...one representing the seller and other representing the buyer?

Claus Lemke: That is what the bill clarifies.

Senator Andrist: Do most firms perform both functions for different customers?

Claus Lemke: Example...the owner has appointed the agency, if you have a buyer, you work exclusively with the buyer, if you have listing, and you work exclusively with the seller. They do sort it out by themselves.

Casey Chapman: Attorney for ND Association of Realtors. (Attachment: #1)

Senator Schneider: How often does an individual agent represents 2 buyers at one time?

Casey Chapman: It is common....what would not be common would be the two buyers on the same house. More typical situation is the example of Century 21 and I would say I am looking for a house. I would sign on to an agency relationship with an agent in that officethey would show me many houses, but there are occasions (not very often) where 2 buyers are represented by the same person may put in and offer on the same house. We felt it was important to address a procedure as to how we deal with this.

Senator Nodland: Are we doing two things here, consumer protection, but cleaning up some misrepresentation with realtors?

Casey Chapman: I wouldn't call it misrepresentation, more as clarification. What we are trying to do is to lay out the best practice in the industry, not only is this the best practice, but now we are going to make it the law. Example: Regarding material defects, even if it is a customer, the agent has an obligation to say to the customer there is water. Agents do currently do that by telling the customer if there is a faulty problem. I have taught the agency classes through the years around the state. I stress disclosing information about the house if there is a problem. Agents are aware of it and we like the idea that is now even with a customer, it is in statute.

Senator Nodland: Isn't it becoming a practice of having inspections done by private agencies and show that when representing a seller or buyer.

Casey Chapman: That is the case....it is a normal recommendation, when a seller sells a house or a buyer is purchasing a house, the buyer conducts an inspection. It is an issue addressed in this bill.....we understand a real estate licensee is not an inspectors. We are not trained as inspectors.....we will leave the inspection up to the inspectors. At times engineers are brought in if the inspector sees an issue necessary for further inspection. All kinds of people can become involved ...appraiser becomes involved, title companies, lawyers. We think this bill encourage consumers to get inspections before they purchase property. It is a small investment to protect for the future to have these inspections.

Senator Klein: Questions

Senator Klein: Anyone in Support of HB1430. Anyone in Opposition?

Senator Klein: Close hearing on HB 1430

2011 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1430
March 14, 2011
Job Number 15387

Conference Committee

Committee Clerk Signature	<i>Eva Lubell</i>
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Explanation or reason for introduction of bill/resolution:

Relating to definitions and the duties of real estate broker firms

Minutes:

Vote

Chairman Klein: Said they are trying to clean up the language on House Bill 1430.

Senator Nodland: Moved a do pass.

Senator Murphy: Seconded the motion.

Roll Call Vote: Yes-7 No-0

Senator Klein to carry the bill

Date: 3/14/11
 Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1430

Senate Industry, Business and Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Nodland Seconded By Senator Murphy

Senators	Yes	No	Senators	Yes	No
Chairman Jerry Klein	✓		Senator Mac Schneider	✓	
VC George L. Nodland	✓		Senator Philip Murphy	✓	
Senator John Andrist	✓				
Senator Lonnie J. Laffen	✓				
Senator Oley Larsen	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Klein

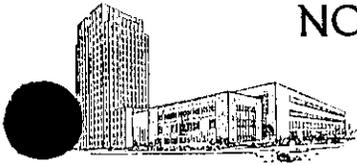
If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1430, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1430 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1430



NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



HB 1430

Chairman Keiser and members of the House IBL committee. My name is Representative Scott Louser of District 5, representing southwest Minot. I am also the broker / owner of Prudential Minot Real Estate, licensed for over 13 years, a past President of the North Dakota Association of Realtors, past Regional Vice President covering ND/SD/MN/NE/IA, current Risk Management Chairman at NAR and 2012 Vice President of the National Association of Realtors. I believe I have a high level of expertise in this area.

I want to begin with an explanation of AGENCY in our industry and provide some history of how we've arrived at this point. Prior to 1995, all licensed real estate agents represented all sellers in transactions (this was either under agency OR sub agency). An example of this would be in negotiating for a purchase agreement:

Example:

The legislative body changed agency law in 1995 and allowed for buyer consumers to be represented in a transaction. At the very least, agency disclosure options MUST be presented to consumers at the first substantive contact with regards to real estate. In current practice, a number of things arise that we as either a broker, a licensing body like the NDREC or the ND Association of Realtors attempt to correct or address. In some cases, it's necessary to approach the legislative body and we've attempted to address those issues in one bill here today.

The first issue is the statutory definition of 'CUSTOMER'. In this industry, when a consumer is represented by a licensee, that consumer has a written contractual agreement with fiduciary duties owed, which include loyalty, obedience, disclosure, confidentiality, reasonable care and accounting. This rises to the definition of CLIENT, whether the client is a seller or a buyer. In the instance

where a property is listed, the seller becomes a client of the listing agent. When a prospective purchaser writes an offer to purchase a property and chooses to remain unrepresented, that buyer becomes a buyer CUSTOMER. Until this bill, the duties owed to a CUSTOMER have not been defined. Page 4 defines the duties owed to a CUSTOMER that still separate CLIENT V. CUSTOMER. They include A. customary acts to assist B. honesty and good faith and C. disclosure of known adverse material facts. Also, lines 16 through 21 place the responsibility of verifying defects, ownership and accuracy of statements in the expert arenas of home inspector and appraiser, title companies and attorneys.

The second issue, addressed in lines 22 through 28 on page 4, discusses the concept of imputed knowledge. Imputed knowledge relates to the obligation of a licensee to disclose the facts they may have learned in the course of a transaction to all other licensees in a firm and the implication that all other licensees should have known that same information. In regular practice, it is all but impossible and in most cases, impractical to have such information shared. For example, if a buyer agent enters negotiations on a purchase and learns information about the seller (motivation for selling) AND uses that information for the benefit of the buyer, why would that buyer agent be obligated to tell other licensees? Taking it a step further, if the buyer is unable to get financing from one lender and begins the process to get financing with another, is it fair to that buyer that their agent open the door to other agents bringing offers? Is it possible that the other agents could have known the motivation of the seller? Imputed knowledge concepts are antiquated and in direct conflict with the confidentiality concept of agency representation.

The final issue addressed in this bill is handling of multiple offers to purchase. This bill requires the disclosure of said multiple offers in writing to all parties. In practice, I do not believe true fiduciary duties can be performed for both parties equally, so the prudent licensee will refer one or both of their clients to another licensee for that transaction. The agent that chooses the poor practice of attempting to represent two clients on the same property must disclose in writing. The final section 6 on page 5 references sellers as opposed to buyers.

I understand this seems like a complicated issue. It does however clear up ambiguity and provides a clearer picture for licensees and consumers alike. We have had months of collaboration on this issue with the North Dakota Association of Realtors, the North Dakota Real Estate Commission and attorneys for both as well as NAR and other state associations. Representatives of all parties in the state mentioned are here in attendance.

Thank you for your time and I urge a do pass for HB 1430....a TRUE AGENCY BILL!

Representative Scott Louser, District 5

TESTIMONY TO THE NORTH DAKOTA SENATE INDUSTRY, BUSINESS, AND LABOR COMMITTEE

DATE: March 14, 2011

BY: Casey Chapman, Attorney, North Dakota Association of REALTORS®

I have been honored to serve as the attorney for the North Dakota Association of REALTORS® for over 25 years. In that capacity, and over those years, I have had the opportunity to watch, and to participate, as North Dakota real estate agency practices have matured, both formally and informally, to provide an efficient method for delivery of real estate services to this state's consumers.

Clearly, the practice of real estate is a business and, like any other business, it works because its participants are able to make a living at it. However, the real estate profession is also very aware of its trusted position in our economy and thus is very sensitive to the need to provide consumers with good services. As a result, the North Dakota Association of REALTORS® has consistently joined with the North Dakota Real Estate Commission in efforts to make North Dakota agency law receptive to the changing needs of consumers in an evolving real estate marketplace. For example, in 1995, Claus Lembke, former executive for the North Dakota Association of REALTORS®, and the Association's current Legislative liaison, suggested a concept called appointed agency to this Legislature; under appointed agency, a broker, whose agents have client relationships with both the seller and the buyer in a transaction, is given an option, under which one agent can be appointed exclusively to represent the seller and another agent can be appointed exclusively to represent the buyer. As a result, many North Dakota real estate consumers have gained the opportunity to receive very effective representation, by allowing agents to better define their agency allegiances, with full disclosure to all participants. At the time that we promoted that legislation, only one or two states in the entire country had adopted such forward-looking concepts; I am proud to say that, since that time, almost 40 states have followed the North Dakota lead and have adopted appointed agency.

Today, I stand before you to support legislation which, once again, promotes the efficient and fair delivery of real estate services. The North Dakota Association of REALTORS®, again working in coordination with the North Dakota Real Estate Commission, supports House Bill 1430, which better defines certain aspects of real estate agency.

House Bill 1430 is intended to address those persons, whom the real estate profession has identified as "customers." As an example, when a consumer wants to look at houses for purchase, and the consumer meets with a real estate agent, the rules of the Real Estate Commission direct that the consumer should be given written disclosure of the different relationships, under which the real estate agent can work; in the real estate profession, we sometimes see this as a menu of options, from which the consumer can make a selection. Many consumers choose to become a client of the real estate agent; in that case, the agent works for the direct benefit of that consumer. As in any business, client relationships involve a commitment from the consumer to that agent and also discuss the compensation of the agent. Some consumers, for any number of reasons, decline to become clients and instead choose to remain as customers, legally unattached to any particular real estate agent.

Prior to the introduction of House Bill 1430, the status of a customer has been addressed by traditional practices, rather than by law. While it was clear in the law that a real estate agent owed certain legal

duties to a client, the actual obligations of a real estate agent to a customer have been less defined. Both the Association and the Real Estate Commission felt that it was better, in view of the fact that many consumers do decide to proceed without actual representation, to clarify the responsibilities of an agent to a customer. Thus, at line 14 of page 1, a "customer" is now defined to mean a consumer who is "not represented" by the real estate brokerage firm. Then, starting at line 30, on page 3, new language has been added to clarify two aspects of the consumer's choice to be a customer; first, the status of customer is specifically identified as a "nonagency relationship," i.e., no agent represents the customer, and, second, the nature of a customer relationship will be disclosed to the consumer in writing under rules adopted by the Real Estate Commission. This process is good for both sides of the relationship, since the consumer clearly understands that there is no client arrangement with the agent and since the agent can be comfortable that the consumer is not expecting the services which a client would receive.

Commencing at line 4, on page 4, a new section of proposed law provides both agents and consumers with a better definition of how agents work with those consumers who choose to remain as customers, rather than clients. With the passage of this bill, customers can expect that:

- (1) The agent will perform customary acts to assist the transaction to a closing. What are those customary acts? For example, the agent, even when working with a buyer customer, will still take the buyer customer to look at houses and will also deliver the customer buyer's contract offers and counteroffers to the seller. In yet another example, an agent, following formation of a purchase contract, may pick up and deliver an abstract of title to the title company and will probably help coordinate the closing date with the closing agent.
- (2) The agent will perform those customary acts with honesty and good faith. Although the agent does not have a client relationship with the customer, these basic obligations are in place to protect the consumer. However, it is also important, and the consumer will be so informed through disclosure, that these basic obligations to a customer are not the same as the expanded duties, shown at lines 25 and 26 of page 3 of the bill, which an agent owes to a client. A customer will receive honesty and good faith; a client will receive, among other duties, loyalty, confidentiality, reasonable care, and diligence.
- (3) Even in the absence of a client relationship, the agent will still be obligated to inform the customer about any adverse material facts, which are actually known by the agent, and which relate to the property's title, physical condition, or defects. Even though these requirements might be included within the honesty and good faith rules, it was felt that specific mention of these obligations was important. The tradition of good real estate agency practice has always required the disclosure of such known problems with a property and this portion of the proposed law endorses that tradition.

House Bill 1430 also addresses other issues, which, it is believed, will clarify the delivery of real estate services in North Dakota.

The proposed provisions at lines 16 through 21, page 4, highlight the reality that a real estate agent can perform the functions of an agent but should not be expected to perform duties routinely performed by other trades or professions. Thus, an agent has no obligation to discover defects in the property

(contrast that statement with the requirement that an agent must disclose defects which are actually known by the agent), to verify the ownership of the property, or to independently verify the accuracy of statements made by other persons. Those obligations will, instead, be left to the expertise of persons such as home inspectors, appraisers, title companies, and attorneys.

Lines 22 through 28 on page 4 address an issue called imputed knowledge. Here, House Bill 1430 follows a recent trend from several other states and clarifies that, while the knowledge of the agent, who is actually involved in the transaction, is important and must be shared, the same is not true for information known by other agents, even in the same office, who have nothing to do with the transaction. As sometimes occurs, this trend is a response to a concern that agents, who have practiced in the real estate arena for many years, gain knowledge on many different properties. There are many large North Dakota brokerages, several have over 50 agents, all of whom engage in multiple transactions; it wouldn't be unusual in those offices for one agent to work a deal on a house without the knowledge of another agent in the office. In such a circumstance, it would be very unfair to assume that each agent in the office shares all information, regarding each house, with all other agents in the office.

The final two sections of the proposed law address the situation, in which the real estate broker, or even an individual agent, represents two consumers who have an interest in the same property. The first section, starting at line 29 on page 4, applies to buyers who seek to purchase the same property, and the next section, starting at line 11 on page 5, applies to sellers who are selling competing properties. In either instance, a client could have a reasonable expectation that the broker or agent is working exclusively for that client. In the situation of two buyer clients, as an example, it would also be very probable that the agent signed an agency agreement with each buyer and showed each buyer a number of different houses; this proposed revision in the law deals with the relatively rare situation where both buyer clients, after looking at those different houses, decide to make an offer on the same house. This proposal recognizes that, if each buyer is represented by a different agent in the brokerage firm, neither buyer's position is jeopardized; however, if an individual agent actually represents both buyers, the agent is required, in fairness, to disclose to each buyer that the individual agent is writing competing offers.

I am convinced that, with the passage of House Bill 1430, North Dakota's real estate agency practice, which has already served as a model for many states, will become even more efficient.

I urge a do pass for HB 1430....a TRUE AGENCY BILL!