

Senate Bill 2212

Ramifications for Wholesaling, Assignment of Contracts and Double Close Transactions



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SENATE BILL 2212

Senate Bill 2212, which was enacted in the recent legislative session, effectively changes the way wholesale properties are to be advertised and sold.

Specifically, the bill amends Section 1101 of the Occupations Code to add a new Section 1101.0045 and adds a new Section 5.086 to the Texas Property Code.

The new statute takes effect September 1, 2017.



NEW SECTION: EQUITABLE INTEREST IN REAL PROPERTY

New Section 1101.0045: EQUITABLE INTEREST IN REAL PROPERTY.

(a) A person may acquire an option or an interest in a contract to purchase real property and then sell or offer to sell the option or assign or offer to assign the contract without holding a license issued under this chapter IF THE PERSON:

- (1) Does not use the option or contract to purchase to engage in REAL ESTATE BROKERAGE; AND
- (2) Discloses the nature of the equitable interest to any potential buyer;



NEW SECTION 1101.0045 (CONT.)

(b) A person selling or offering to sell an option or assigning or offering to assign an interest in a contract to purchase real property without disclosing the nature of that interest to a potential buyer IS ENGAGING IN REAL ESTATE BROKERAGE.



NEW SECTION 5.086 TO TEXAS PROPERTY CODE

EQUITABLE INTEREST DISCLOSURE.

Before entering into a contract, a person selling an option or assigning an interest in a contract to purchase real property must disclose to any potential buyer that the person is selling only an option or assigning an interest in a contract and that the person does not have legal title to the real property.



WHAT IS “REAL ESTATE BROKERAGE”?

The Real Estate License Act that took effect June 1, 2003, defines what acts constitute “real estate brokerage”:

Specifically a “Broker” means a person who, in exchange for a commission or **OTHER VALUABLE CONSIDERATION**, or with the expectation of receiving a commission **OR OTHER VALUABLE CONSIDERATION**, performs for another person one of the following acts:



WHAT IS “REAL ESTATE BROKERAGE”? (CONT.)

- (1) Sells, exchanges, purchases or leases real estate;
- (2) Offers to sell, exchange, purchase or lease real estate;
- (3) Negotiates or attempts to negotiate the listing, sale exchange, purchase or lease of real estate;
- (4) Lists or offers, attempts, or agrees to list real estate for sale, lease or exchange;



WHAT IS “REAL ESTATE BROKERAGE”? (CONT.)

(5) Auctions or offers or offers, attempts or agrees to auction real estate;

(6) Deals in option on real estate, including a lease to purchase or buying, selling or offering to buy or sell options on real estate;

(7) Aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease...



EFFECT ON WHOLESALER (ASSIGNMENT) TRANSACTIONS?

1) Must disclose in any advertising to buyers that the wholesaler does not own legal title but only equitable title as buyer under a contract;

2) Should offer to sell only the contract, not the property for a designated Assignment Fee price;



EFFECT ON WHOLESALE (ASSIGNMENT) TRANSACTIONS? (CONT.)

3) Assignment Contracts will need to be amended to specify that the wholesaler is only offering an assignment fee for a set fee; and

4) I recommend that a new disclosure be added to the closing documents for a buyer to sign at closing acknowledging that they were advised that the wholesaler did not own the property and they were aware of the nature of their interest.



POSSIBLE EXAMPLES OF ADVERTISING DO'S AND DON'TS:

“ 973 Smith Street for Sale - \$100,000”

Constitutes real estate brokerage per the Occupations Code – Offering the underlying real estate for sale.

“ Assignment contract for real property at 973 Smith. Assignment fee of \$10,000 payable to XYZ Wholesaler”

Should comply with the new Property Code provision and does not constitute brokerage as it does not market the underlying real estate



EFFECT ON DOUBLE CLOSE TRANSACTIONS?

In my opinion, the wholesaler could have an issue on a double close transaction as well.

In particular, the wholesaler would still would have to be careful in their advertising a property that they do not own. Could fall within the definition of real estate brokerage.

One fix could be to just add in advertising:

“Under contract – offering 973 Smith for \$100,000 subject to XYZ Wholesaler’s closing on the purchase”



PENALTIES FOR NONCOMPLIANCE

Section 1101.758 Texas Occupations Code

(a) A Person commits an offense if the person acts as a broker or sale agent under this Chapter without holding a certificate.

(b) An offense under this Section is a Class A Misdemeanor.

This would be a Class A misdemeanor for EACH OFFENSE.



PENALTIES FOR NONCOMPLIANCE (CONT.)

Multiple Class A Misdemeanors can result in a Felony Charge

In addition, the Occupations code provides for a private cause of action for violations such as receiving consideration as a result of acting as a broker.

The aggrieved person may receive a penalty of not less than the amount of money received or more than three times the amount received by the violator.



QUESTIONS?



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