

“Public and Private Restraints to Alternative Business Models for Consumers”

*Remarks by Wayne Thorburn
Presented to the
Federal Trade Commission/Department of Justice
Workshop on Competition Policy and the Real Estate Industry
Washington, D.C.
October 25, 2006*

I am here today as the Immediate Past President of the Association of Real Estate License Law Officials (ARELLO) and also as Administrator of the Texas Real Estate Commission. However, my comments today are solely mine and should not be construed as an official position of either ARELLO or TREC. While the issue of competition in real estate is a most important one for regulators and for ARELLO, the organization has not taken any official position on modes of competition or the requirement of providing specified minimum services.

About fifty years ago, a wise man named Richard Weaver wrote a book entitled “Ideas Have Consequences” and the title says it all. And, despite what the Mad Hatter said, words do have definite and concrete meanings. Two words that I believe we should focus on and take into consideration their meanings are **agency** and **representation**.

Let me begin by saying that it has been accepted for some time that a real estate broker while acting as an agent for another is **a fiduciary**. As a fiduciary, a real estate broker is held to owe **specific duties** to his or her principal, including loyalty, disclosure, confidentiality, reasonable care and diligence. As an agent, the broker has agreed to **provide representation** to his or her client **throughout a real estate transaction** - not only on the day the agency agreement is signed.

In its last regular session the Texas Legislature enacted a provision whereby a broker who obtains an exclusive agreement to represent a party in a real estate transaction is that party’s agent. Such a person must **inform his client if he receives material information related to a transaction, must answer the client’s questions** and **present any offer to or from the client** and may not instruct another broker to negotiate directly with the first broker’s client. Now these

seem to be rather basic characteristics and requirements of representation - the kinds of services virtually all consumers would expect when they hire someone **to represent them as their agent**.

The responsibility for licensing and regulating real estate agents has been placed in the hands of the various states and, as regulators, we are required to apply state statutes and set forth the requirements for obtaining and retaining a real estate license. Many jurisdictions have attempted to spell out in more detail the fiduciary duties of an individual who purports to be **an agent of another** and contracts to **provide representation in a real estate transaction**. However, it appears that certain individuals here in Washington do not believe that these basic elements should be requirements for representation, that an individual can claim to be an agent without performing **any** of these duties for the person they are claiming to represent in a real estate transaction.

Perhaps it would be more helpful if their emphasis were placed on preventing false claims by those who sign an agency agreement with a client, promise to provide representation, place the property information on the Internet, and then walk away from any further involvement in the real estate transaction. Frankly, I have no problem with this “alternative business model” as it has been called except that it is **neither agency nor representation**. Simply stated, it is a marketing or advertising agreement.

And that brings us to a related issue which lies beneath the surface of much of the involvement of the Federal agencies and their efforts to support “alternative business models for consumers.” Somehow there has developed a belief in Washington that there is only one way of effectively marketing residential real estate - and that is through a private entity called the Multiple Listing Service (MLS). As state licensing agencies we do not regulate the MLS. It is a private voluntary organization which establishes its own membership criteria. Since the Federal Trade Commission and the Department Of Justice apparently are unable to coerce this private entity into changing its criteria to meet their demands, they are approaching the issue indirectly by attempting to influence state legislatures and regulatory bodies.

Let's just look for a moment at competition in the marketing of residential real estate. Not only is there this thing called the MLS but there is also:

- every daily newspaper in the country which runs classified and display ads
- free distribution publications available at retail stores and corner display boxes
- web pages galore - now even Yahoo, Lycos, eBay selling real estate.

To pretend that the MLS system is the only way to market real estate belies the reality of the competition present throughout the United States. To purport that an agent who claims to represent another has no fiduciary duty to provide minimal services runs counter to public expectations and negates the ability of states to effectively license and regulate real estate professionals.

I think it is safe to say that most state regulators have no problem with individuals entering into marketing or advertising agreements with clients to promote the sale of real estate. In fact, in most states one does not even need a real estate license to do so. But I do object, and so do many other regulators, to individuals claiming to be an agent and then refusing to perform the most basic duties of representation. The "alternative business model" cannot have it both ways: either it is (1) an agency agreement for representation throughout a real estate transaction with all the concomitant fiduciary responsibilities encompassed in such a relationship or (2) it is merely an advertising and marketing agreement. And that distinction is a matter which should be of interest to the Federal Trade Commission in ensuring that the public is truly receiving the service for which they have contracted when they entered into an agreement for representation.

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