
Sneed Law Firm, LLC

Memorandum

To: The Honorable Les Mason, Chairman
House Commerce, Labor and Economic Development Committee

From: William W. Sneed, Retained Counsel
USAA

Date: February 12, 2018

RE: HB 2494

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I represent USAA Residential Real Estate Services. As you will recall, at our request this Committee introduced a proposal for my client which is now encompassed in H.B. 2494. With me today is C.B. Starks with USAA, who will also be providing testimony.

I. BACKGROUND.

At issue here today is K.S.A. 58-3062(a)(3) and (a)(4), which prohibits the use of rebates within a normal real estate transaction. Unfortunately, there is no definition of the word "rebate" within the Act. Over the years, the Kansas Real Estate Commission ("KREC") attempted to handle this issue on a case-by-case basis, and over the years published these "opinions" on the KREC web page. That practice ran afoul of Kansas law dealing with formally adopted regulations. Thus, in June of 2017, KREC commissioned a public hearing to define what constitutes a rebate (Proposed Regulation K.A.R. 86-3-32). Although some had real concerns as to the legal authority for KREC to promulgate this regulation, my client started a dialogue with KREC in an attempt to craft the regulation in a manner that would not disrupt my client's reward system, which Mr. Starks will discuss.

Over the next several months, my client worked with KREC, but in the end we were unable to reach a solution that was acceptable to all parties.

At KREC's October meeting, with no solution on the proposed regulation, KREC directed staff to work with interested parties to seek a legislative solution. Again after several attempts, the parties were unable to arrive at an agreement. KREC can speak for themselves, but the Board agreed to continue studying the issue. However, my client, concerned about the uncertainty of the issue, made the decision to move forward and request a legislative solution. Thereafter, KREC had a meeting on January 16, 2018 to discuss our proposal. The Board directed the staff to comment on our bill.

II. LEGISLATIVE HISTORY.

K.S.A. 58-3062 was first adopted in 1980 (Laws 1980, ch. 164, §29) and has been amended from time to time. Generally, the statute sets forth a list of prohibited acts for licensed Kansas real estate agents. Compliance with the statute is enforced by KREC. As early as 1995, the statute stated that no agent shall "accept, give or charge any rebate or undisclosed commission." At that time, the statute also provided that no agent should "offer or give prizes, gifts or gratuities which are contingent upon an agency agreement or the sale, purchase or lease of real estate." K.S.A. 1995 Supp. 58-3062, subsections 4 and 11, respectively; see also Laws 1996, ch. 212, §7. At no time was the word "rebate" defined in the statute.

The prohibition on offering or giving prizes, gifts or gratuities was repealed in its entirety in 2004. Laws 2004, ch 180, §6. The "rebate" prohibition remains unchanged to date. There are no Kansas appellate court decisions interpreting subsection (a)(3) of K.S.A. 58-3062.

III. BENEFITS OF REBATES AND INDUCEMENTS.

The predominant form of payment for real estate brokerage services remains the "commission," a percentage of the price paid for the property. Brokers may compete by offering their services at different commission levels. To compete against one another, brokers in other states also frequently offer customers rebates and inducements. Examples of rebates and inducements include cash (whereby the buyer's broker offers some percentage or amount of his or her commission to the buyer),

free products and services (such as televisions or home inspections), discounts or vouchers for other products and services (such as home moving services or home improvement stores), and donations to charities on the customer's behalf.

Rebates and inducements benefit home buyers and sellers. Under the traditional structure of a real estate contract, the seller and seller's broker determine the amount of the commission, and how it is allocated between the seller's and buyer's broker. If the seller's broker also finds the buyer, then that broker keeps the full commission. If, instead, different brokers represent the seller and buyer, the seller's broker pays the commission of the buyer's broker, and the size of that payment is not controlled by the buyer. Being able to offer rebates and inducements allows brokers to compete for the buyer's business by reducing the compensation they receive for representing a buyer.

Rebates also benefit sellers. Rebates, for example, could be selectively offered to more price-sensitive home sellers. Thus, a broker could keep his or her commission fixed (for example at six percent), but discount to certain sellers through a rebate or inducement.

Buyers and sellers may also benefit from inducements, such as free or reduced-priced non-real estate brokerage services, for which a broker may be able to contract at lower prices than would normally be available to buyers and sellers.

More generally, a more competitive and more efficiently-operating marketplace will tend to generate greater benefits for both home sellers and home buyers. All buyers and sellers benefit if the process of selling homes is less expensive. Consequently, allowing non-misleading rebates and inducements is procompetitive and represents an important component of price competition. Such price competition is permitted in most states. National discount brokers, for example, advertise rebates and inducements in the many states where they are permitted. Customers in these states then ask for rebates and inducements.

IV. THE STATUTE TO BAN REBATES AND INDUCEMENTS IS AN UNREASONABLE RESTRAINT OF TRADE THAT IS *PER SE* ILLEGAL.

The Department of Justice and Federal Trade Commission have long recognized that rebates, gifts, gratuities, and inducements "can be powerful tools for price competition among brokers." Federal Trade Commission & U.S. Department of Justice, *Competition in the Real Estate Brokerage*

Industry 15 (April 2007), <https://www.justice.gov/atr/competition-real-estate-brokerage-industry>. As the antitrust agencies found, most states permit rebates, gifts, and gratuities. DOJ, *Rebates Make Buying A Home Less Expensive*, <https://www.justice.gov/atr/rebates-make-buying-home-less-expensive>. Brokers in these states may freely advertise their willingness to offer rebates (i.e. cash payments) and inducements, such as gift certificates, coupons, vouchers, and discounted or free services relating to buying and selling a home, to buyers and sellers. These rebates and inducements can save consumers several thousand dollars in a single transaction. *Id.* “[I]n states that do not prohibit them, brokers may offer. These are incentives that typically are offered by cooperating brokers to home buyers to encourage them to use the brokers’ services. For example, 1% Realty offers buyers a rebate of approximately 1 percent of the purchase price in states that have not prohibited rebates.” (FTC & DOJ Real Estate Report at 15.) As the DOJ observed, “Offering rebates and incentives is one way that real estate brokers can compete for consumers’ business, leading to lower prices to consumers.” DOJ, *Rebates Make Buying A Home Less Expensive*, <https://www.justice.gov/atr/rebates-make-buying-home-less-expensive>.

The DOJ and FTC have not found any pro-competitive justification for banning rebates, gifts or inducements. As the agencies concluded:

No Workshop panelist who commented on rebate bans found any justification for them. . . One panelist noted that, given the clear benefits of rebates to consumers, it is ‘hard to find a good articulated defense’ of rebate prohibitions. Proponents of such provisions claim that they protect consumers from false and misleading offers of rebates and help ensure that consumers choose brokers on the basis of the quality of the service, rather than price. While states properly are concerned with issues of consumer fraud, there is no evidence that rebates have harmed consumers or that rebate bans improve service quality. It is clear, however, that rebate prohibitions harm consumers by preventing price competition.

(FTC & DOJ Real Estate Report at 52.) As the DOJ observed, “Some have argued that refunds and incentives can tempt consumers into closing on real estate transactions against their best interests. The Antitrust Division has found no evidence that refunds and incentives harm consumers. On the contrary, they can dramatically lower the price that consumers pay for brokerage services.” (DOJ, *Rebates Make Buying A Home Less Expensive*, <https://www.justice.gov/atr/rebates-make-buying-home-less-expensive>.)

Given the significant anticompetitive effects in banning rebates and gifts, the DOJ cautioned the Kansas Real Estate Commission here about its proposed regulation to define rebate. Basically, the Commission's proposed regulation, the DOJ concluded, "would take money out of home buyers' pockets." Department of Justice, Press Release, *Justice Department Expresses Concerns to Kansas Real Estate Commission Regarding Regulation That Would Prohibit Real Estate Agents from Offering Gift Cards to Home Buyers: Regulation Would Take Money Out of Home Buyers' Pockets* (June 16, 2017), <https://www.justice.gov/opa/pr/justice-department-expresses-concerns-kansas-real-estate-commission-regarding-regulation>. As the DOJ noted, its "previous investigations into rules restricting rebates have found that brokers often support these rules precisely because they restrict competition." (DOJ Letter to Erik Wisner, Kansas Real Estate Commission, dated June 16, 2017, <https://www.justice.gov/opa/press-release/file/975031/download>.) The DOJ did not weigh in whether the Kansas Real Estate Commission had the authority to adopt its proposed regulation (and if so whether its anticompetitive regulation would be immune from antitrust attack). But to the extent that the Commission did have this authority, the DOJ encouraged the Commission "to use that authority to adopt a definition that does not further restrain an important dimension of price competition that benefits home buyers in Kansas." (DOJ June 16 Letter at 2.) Thus, the proposed bill would align Kansas with the overwhelming majority of states, and increase competition to the benefit of Kansas consumers and home buyers thinking of moving to Kansas.

V. OTHER STATES' LAWS REGARDING REBATES.

Currently, there are 44 states that allow some form of rebates within a real estate transaction. You may also be hearing from the U.S. Justice Department regarding their activity against these remaining states that prohibit all rebates. Please see the attached document for the Department of Justice website that demonstrates their general opinion.

VI. USAA PROPOSAL.

My client's proposal is quite simple. Rebates are allowed so long as they are disclosed. Thus, any lingering fears that the state might have regarding any non-level negotiating between parties will be satisfied as all parties to the transaction know what program is being applied in the transaction.

The Honorable Les Mason
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VII. CONCLUSION.

On behalf of my client, thank you for allowing us the opportunity to present what we believe is a vital proposal that will benefit Kansas consumers. We respectfully urge that at the appropriate time, the Committee recommend H.B. 2494 favorably for passage.

I am happy to discuss or answer questions at any time.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "William W. Sneed".

William W. Sneed

WWS:kjb

REBATES MAKE BUYING A HOME LESS EXPENSIVE



In purchases where buyer's brokers are offered half of a 5% commission, they may compete on price by refunding commission to the homebuyer. A 1% rebate on the median-priced home would save the homebuyer \$1,843.

[Consumers can save thousands of dollars in commissions](#)

[Calculate how much you can save](#)

Certain States Ban Rebates

In most states brokers compete on price for consumers' business. However, ten states have enacted laws that forbid brokers from offering consumers the benefits of price competition and driving prices higher than they would be in a more competitive market.

[States that ban brokers from offering rebates](#)

[Department of Justice efforts to lift rebate bans](#)

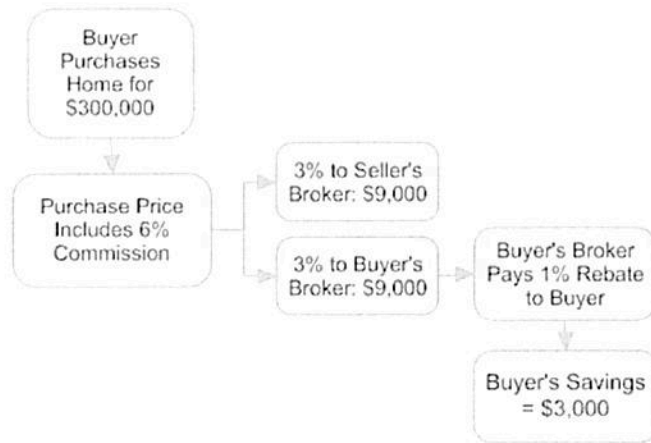
How do rebates work?

Some real estate brokers offer consumers cash refunds or non-cash incentives to encourage them to use that broker's services. Rebates are payments from the real estate broker to his or her client after closing. Incentives may include gift certificates, closing-cost payments, or fees such as home inspections or moving services.

[Learn more: Full-Service Discount Brokers](#)

How do rebates benefit consumers?

Rebates can save consumers several thousand dollars in a single transaction. For example, if a broker offers to refund one-third of its commission to the homebuyer, the average buyer of a \$300,000 home could save \$2,500 to \$3,000 (based on the 2.5% to 3% commission rates typically earned by a broker).



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Incentives, such as gift certificates for a home inspection, merchandise at a nearby hardware store, or moving services, give consumers more value from the transaction that they otherwise would not have obtained.

Offering rebates and incentives is one way that real estate brokers can compete for consumers' business, leading to lower prices to consumers.

Do refunds and incentives pose any risk to consumers?

Some have argued that refunds and incentives can tempt consumers into closing on real estate transactions against their best interests. The Department of Justice has found no evidence that refunds and incentives harm consumers. On the contrary, they can dramatically lower the price that consumers pay for real estate services.

Do real estate brokers support rebate bans?

Some brokers support rebate bans as a means of reducing price competition. For example, when the [Kentucky Real Estate Commission sued to lift that state's rebate ban](#), here is what some of them said:

"If we give rebates and inducements, it would get out of control and all clients would be wanting something. The present law keeps it under

"This would turn into a bidding war, lessen our profits and cheapen our 'so-called' profession."

"If inducements were allowed, they could lead to competitive behavior, which would make us look unprofessional in the eyes of the public."

"I think this would just take money right out of our pocket."

Which states currently ban rebates and/or inducements?

Ten states currently have laws that ban rebates. Nine states have a full ban on broker rebates: [Alabama](#), [Alaska](#), [Kansas](#), [Louisiana](#), [Mississippi](#), [Oklahoma](#), [Oregon](#), and [Tennessee](#). In addition, [Iowa](#) prohibits rebates when the consumers use the services of two or more real estate brokers in a transaction.

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