

2011-2012 Update Course

SECTION FIVE

LICENSE LAW CHANGES

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Learning Objective: Upon completing this Section, licensees should be aware of amendments to current Real Estate License Law passed by the General Assembly during the 2011 session most of which will become effective January 1, 2012.

INTRODUCTION

Real Estate License Law is found in Chapter 93A of the General Statutes. **House Bill 386** entitled “An Act to Modernize the North Carolina Real Estate License Law” was introduced in the 2011-2012 session of the General Assembly. It passed both houses and has become law, although its *effective date is January 1, 2012*, except for one clause allowing rule-making to proceed immediately regarding impending changes in licensing non-residents and in reinstating provisional broker licenses previously canceled. To the extent the changes in the laws will affect licensees, those changes are summarized herein; technical changes or those not impacting licensees directly will not be addressed. Licensees who wish to see the entire ratified bill may go to www.ncga.state.nc.us and under “Find a Bill” in the upper right hand corner insert H386 and “Go.” The revised statutes also should be available on the Commission’s website after January 1, 2012.

Definitions and Exceptions [G.S. 93A-2(c).]

The act seeks to clarify certain exceptions under §93A-2(c) regarding conduct that may look like brokerage activity but which does *not* require a real estate license, i.e., that is exempt from the licensing requirements.

Owners of Property

The exception for *entities* that hold title to property versus individual owners is now completely separate, with the *entity exemption* found in (c)(1) and the *individual owner*

exemption found in (c)(7). Note, however, that *entities typically may only buy, rent, lease, sell or exchange property titled in the name of the entity through its principals* who have the legal authority to enter into contracts and create obligations in the name of the entity, namely, *managers* of limited liability companies, *general partners* of any kind of partnership, usually *trustees* of business trusts, etc. *Most entities* may only work through these principals and *may not use unlicensed salaried employees to buy, rent, lease, sell or exchange property titled in the name of the entity*. The lone exception in North Carolina is corporate owners which are permitted to buy, rent, lease, sell or exchange property titled in the name of the corporation through its unlicensed officers and unlicensed salaried employees. This interpretation results in part from two Attorney General Opinions that date to the 1960's and 1970's.

Attorney Exception

It also expands the explanation of what is meant by the attorney exemption found in (c)(3), but does not represent any change in the Commission's long-held position that attorneys generally may *not* engage in brokerage activity *without having an active broker license*. An attorney's law license allows them to practice law, not to engage in brokerage; the latter requires an active North Carolina real estate license. The simple former statement that the provisions of Chapter 93A do not apply to "...the acts or services of an attorney-at-law" will now exempt the acts and services of an active member of the North Carolina State Bar "... *if* the acts and services constitute the practice of law under Chapter 84 of the General Statutes." Thus, if the services being provided require a law license, then an attorney on active status may be compensated therefor, even though the services may impact an interest in real estate. However, if the services being provided do not require a law license, then having a law license is irrelevant and the person providing the service must possess the appropriate license on active status to receive compensation for that activity. Note too that how the compensation is calculated usually differs — brokers often charge a percentage of some number *if* a sale or lease occurs, whereas attorneys generally charge hourly rates. Attorneys rarely charge fees based on a formula that also depends on outcome, unless perhaps in medical malpractice or personal injury cases.

Trustees

As of January 1, 2012, the trustee exception found in (c)(5) will require that the trust agreement or Will be in writing and that the trust agreement or deed of trust must specifically identify the trustee, the beneficiary, the trust corpus and the trustee's authority as to the trust corpus.

Unlicensed Salaried Employees of a Broker

Brokers who have been hired to *manage property for others* are and have been able to hire unlicensed salaried employees to assist the broker in managing and leasing these properties. Acts the unlicensed W-2 employee may perform are enumerated in (c)(6); while the *unlicensed employee* can show units, provide information about the property, accept rent payments and tenant security deposits made payable to the broker or the owner, take rental applications, and even fill in the blanks on a preprinted lease form and sign the broker's name creating a valid lease agreement, they have been and are *prohibited from negotiating rent or deposit amounts or other lease terms*. However, *after January 1, 2012*, the unlicensed *salaried employee of a broker who engages in vacation rental management* for others *may also, in addition to the foregoing acts, "...offer a prospective tenant a rental price and term from a schedule setting*

forth prices and terms and the conditions and limitations under which they may be offered. The schedule shall be written and provided by the employee's employing broker with the written authority of the landlord." Understand that the unlicensed employee still may not "negotiate" amounts or lease terms outside of the written parameters provided by the broker and approved by the owner. Such negotiations must be referred to and handled by the broker.

Recognize that this **unlicensed property management exception only applies to the salaried employees of a broker** who manages property for others. Note too that the general exception is not expressly limited to *residential* property management (other than the provision regarding vacation rentals). Thus, it would appear that a broker who is managing the leasing of an office building or commercial retail center also would have the ability to hire unlicensed salaried employees to assist the broker with the leasing of those commercial spaces *so long as* the employee's activities were confined to the acts enumerated in the statute and the employee did not negotiate.

Unlicensed Management Assistance Contrary to Law

Unlicensed owners, whether entities or individuals, may not hire unlicensed persons to help show units, provide information about the property, collect rents, etc. (The lone exception again being a corporate owner who is permitted to lease, sell, exchange property titled in the name of the corporation through its unlicensed salaried officers and employees.) In all non-corporate owner situations, both the property owner and the unlicensed person hired to assist would be committing a misdemeanor to pay or receive compensation or consideration. The property owner would violate criminal statute G.S. 14-2.6 by paying the unlicensed non-owner employee who would violate G.S. 93A-1 if s/he accepted the compensation or consideration. It is suspected that there is a lot of illegal property management occurring in North Carolina in part because owners don't know the law and don't understand that just because they own the property doesn't mean they can do whatever they want with it through whomever they choose to hire. Brokers are encouraged to educate the public when they encounter illegal unlicensed brokerage activity and/or report it to the Real Estate Commission.

Provisional Broker License Cancellation Changed [93A-4]

One of the more significant amendments to License Law impacts **provisional brokers**. As of January 1, 2012, G.S. 93A-4(a1) will state that the license of any provisional broker who fails to complete the 90 hours of post-licensing education prior to the third anniversary of license issuance will be placed on *inactive status*, but it ***no longer will be cancelled*** as under current law. Further, all provisional broker licenses that have been cancelled between April 1, 2009 and December 31, 2011 for failure to timely complete all required postlicensing education will automatically be reinstated on inactive status in early January 2012. Former licensees impacted by this change will receive a notice from the Commission concerning the reinstatement of their former license, which they will be able to retain in the future by paying the annual renewal fee by June 30 of each year, beginning in June 2012. Thus, the individual will again have a license, but will not be able to use the license, which will remain indefinitely on inactive status so long as the individual pays the annual renewal fee, until the person does whatever is necessary to activate that license. The requirements regarding license activation will be determined by rule, the provisions of which are still being discussed as of June/July 2011.

Consideration of a License Applicant's Character

The statute also was amended to allow the Commission to consider not only the integrity, moral character and general fitness of a license applicant, but the mental and emotional fitness of an applicant as it may generally relate to real estate brokerage and the public's interest. Further, the statute now expressly states that *criminal record reports, credit reports and any reports concerning an applicant's mental or emotional fitness received as part of the application process shall not be considered public records* under the public records act.

Disciplinary Action [G.S. 93A-6]

G.S. 93A-6 is the statute that lists under subparagraph (a) the fifteen things that may subject a licensee to disciplinary action. Recall too that under (b)(3), a licensee may be subject to disciplinary action if s/he violates any of the fifteen provisions under (a) when leasing, selling or buying the licensee's own property. Amendments to this statute address the following:

Broker's Responsibility for Closing Statements

The amendment clarifies what a broker not acting as a settlement agent must provide as to closing statements in a sales transaction. As of January 1, 2012, the broker must "... deliver to the broker's client a detailed and accurate closing statement showing the receipt and disbursement of all monies relating to the transaction about which the broker knows or reasonably should know. If a closing statement is prepared by an attorney or lawful settlement agent, a broker may rely on the delivery of that statement, but the broker must review the statement for accuracy and notify all parties to the closing of any errors." This statutory change accords with the Commission's interpretation of a broker's obligations when not acting as the settlement agent; licensees are referred to Section 3 of the 2010-2011 *Real Estate Update* Course materials (GFEs & HUD-1s), which is now available on the Commission's website under "Publications," for a fuller discussion of this topic.

Criminal Offenses Warranting Disciplinary Action

The amendment expands upon the criminal offenses under (b)(2) that may result in disciplinary action against a licensee upon conviction to include: "any misdemeanor or felony that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, forgery, larceny, misappropriation of funds or property, perjury, or any other offense showing professional unfitness or involving moral turpitude which would reasonably affect the licensee's performance in the real estate business."

Disciplinary Action by Other Professional Boards

A new (b)(5) attempts to clarify what types of offenses leading to disciplinary action by other professional boards might subject a broker to disciplinary action by the Commission. The new subparagraph states: "The licensee, who is also licensed as an appraiser, attorney, home inspector, mortgage broker, general contractor, or member of another licensed profession or occupation, has been disciplined for an offense under any law involving fraud, theft, misrepresentation, breach of trust or fiduciary responsibility, or willful or negligent malpractice."

New Definition of "Bank"

A new subparagraph (g) in G.S. 93A-6 provides a new definition of "bank" for trust account purposes and removes the former "in North Carolina" requirement. New subparagraph

(g) now specifically requires that a broker's trust or escrow account must be a: 1) ***demand deposit account***, 2) in a "federally insured depository institution," 3) lawfully doing business in North Carolina, that 4) agrees to make its records of the broker's account available to the Commission.

As a practical matter, this final change probably will not impact the majority of resident North Carolina brokers who presumably have their trust and operating accounts at banks in the community where they reside or have an office. The amendment primarily will benefit brokers holding a non-resident North Carolina license who do not maintain any address in North Carolina, i.e., no residential, office or mailing address, but who enter North Carolina to engage in brokerage activity, but then return to their office in Georgia, or Tennessee, or Virginia, or South Carolina, or Texas or Colorado, etc. In the past, such a non-resident broker who had no presence in North Carolina nonetheless was required to open his/her trust account in a bank physically located in North Carolina if holding trust monies arising from North Carolina brokerage transactions. As of January 1, 2012, that non-resident broker (or any resident broker) could open a demand deposit trust account for his/her North Carolina brokerage activity in any federally insured depository institution lawfully doing business in North Carolina that agreed to make the account records available to the Commission, regardless of where the depository institution was located.

★ Conflict Between License Law & Residential Tenant Security Deposit Law ★

Brokers who provide residential property management services should be aware of the potential conflict as of January 1, 2012 between revised G.S. 93A-6(a)(12) and 93A-6(g) discussed above and the provisions of North Carolina residential landlord-tenant law stating that a residential tenant security deposit "... shall be deposited in a trust account with a licensed and insured bank or savings institution *located in the State of North Carolina*, or the landlord may, at his option, furnish a bond" [G.S. 42-50.]

Generally, where two laws conflict, the more restrictive law controls. Thus, it would appear that after January 1, 2012, a broker engaging in residential property management may have his/her trust accounts in any depository institution that otherwise satisfies the four components identified above ***except for*** trust accounts containing residential tenant security deposits from properties located in North Carolina. The latter trust account should be opened in an insured bank or savings and loan physically located in North Carolina to comply with North Carolina residential landlord-tenant law, unless the landlord posts a bond in an amount equivalent to the tenant security deposit.

NOTE: Legislation was pending in the last General Assembly session to revise the landlord-tenant laws to adopt similar parameters for an acceptable "financial institution," and while that legislation is eligible for consideration in the short session of the General Assembly, it was not enacted into law as of the conclusion of the September, 2011 meeting of the General Assembly.

Licensing Foreign Brokers, Exam Changes & Recovery Fund Limits

Of the remaining amendments to License Law, two that will be mentioned are those relating to licensing foreign brokers and increases in the Recovery Fund limits. **G.S. 93A-9**, formerly “licensing non-residents,” has been substantially revised and simplified. After January 1, 2012 it will provide that any person licensed in a foreign jurisdiction who is applying for licensure in North Carolina and who satisfies the general licensure requirements set out in G.S. 93A-4 “...or such other requirements as the Commission in its discretion may be rule require” may obtain a North Carolina license comparable to the applicant’s foreign license. The exact details of this process and the necessary rules to implement the new procedure are still being devised.

The Recovery Fund limits set forth in **G.S. 93A-21** will increase effective January 1, 2012 from \$25,000 to **\$50,000 maximum** per transaction, regardless of the number of people or parcels involved. Aggregate payments still may not exceed \$25,000 in any given *calendar year* for a licensee, but the total maximum aggregate payments arising from any one licensee’s misconduct will increase from \$50,000 to **\$75,000**. Recall that payments from the Recovery Fund are limited to consumers who have suffered “...a direct monetary loss by reason of the *conversion of trust funds ...*” by a broker (or the broker’s employee). Consumers who obtain judgments against brokers for damages arising from misrepresentation or omission of material fact or anything other than conversion of trust monies are not eligible to seek any payments from the Recovery Fund. Licensees should also understand that their ***license will automatically be suspended*** on the date the order is entered directing payment from the Recovery Fund and the license ***may not be reinstated until all sums have been repaid in full to the Fund, including interest*** at the legal rate (currently 8% per year).

Next year’s Update Course most likely will include a discussion of various Rules that may need to be amended to accommodate or facilitate the foregoing statutory changes.

License Law Revisions Resulting from Other Legislation

Three other bills, separate and distinct from the Commission’s proposed legislative changes found in HB 386, impacted License Law. The first is an amendment to **G.S. 93A-12** that would allow attorney escrow agents to utilize the 90 day notice letter procedure when holding disputed funds, which procedure previously was available only to real estate brokers holding disputed funds. This revision is *effective October 1, 2011*.

Written agency agreements

Another bill adds a new statute to License Law, namely, **G.S. 93A-13**. This new statute merely codifies the Commission’s long-stated position that if a broker fails to timely secure a written agency agreement with the broker’s principal, then the broker should not be entitled to collect any compensation. The text of the new law succinctly states:

§93A-13. Contracts for broker services. No action between a broker and the broker’s client for recovery under an agreement for broker services is valid unless the contract is reduced to writing and signed by the party to be charged or by some other person lawfully authorized by the party to sign.

This new law also becomes *effective October 1, 2011*, rather than January 1, 2012, the effective date of all License Law changes arising from the Commission's bill. Thus, as of October 1, 2011, a consumer being sued by his/her real estate broker for the broker's fee may defeat the broker's claim for compensation if the consumer can show that the broker failed to timely enter into a written agency agreement signed by the consumer, i.e., "the party to be charged."

Owner Association and Restrictive Covenants Disclosure

Lastly, HB 165 amended, among other statutes, certain provisions in Chapter 47E, the Residential Property Disclosure Act. Specifically, as of January 1, 2012, it requires residential property owners to not only provide the Residential Property Disclosure Statement (unless exempt), but also to furnish to a purchaser an "owners' association and mandatory covenants disclosure statement." New **G.S. 47E-4(b1)** lists the information to be contained in this new disclosure statement and is reprinted below. The Real Estate Commission has been charged with the responsibility of developing and distributing this new disclosure statement by December 1, 2011. A seller's failure to timely provide the required owner association/covenant disclosure statement results in the same consequences as a seller's failure to timely provide the Residential Property Disclosure Statement when required.

This same bill also requires the Real Estate Commission to "develop and make available for homebuyers a brochure about restrictive covenants. The brochure shall include an explanation that unpaid assessments, fines, fees, or charges may result in foreclosure of the owner's property." This brochure also is to be available by December 1, 2011.

Revised Statute 47E-4(b1) effective January 1, 2012:

G.S. 47E-4. Required disclosures.

Subparagraphs (a) and (b) unchanged; new (b1) below:

(b1) With regard to transfers described in G.S. 47E-1, the owner of the real property shall furnish to a purchaser an owners' association and mandatory covenants disclosure statement.

(1) The North Carolina Real Estate Commission shall develop and require the use of a standard disclosure statement to comply with the requirements of this subsection. The disclosure statement shall specify that certain transfers of residential property are excluded from this requirement by G.S. 47E-2, including transfers of residential property made pursuant to a lease with an option to purchase where the lessee occupies or intends to occupy the dwelling. The standard disclosure statement shall require disclosure of whether or not the property to be conveyed is subject to regulation by one or more owners' association(s) and governing documents which impose various mandatory covenants, conditions, and restrictions upon the property, including, but not limited to, obligations to pay regular assessments or dues and special assessments. The statement required by this subsection shall include information on all of the following:

- a. The name, address, telephone number, or e-mail address for the president or manager of the association to which the lot is subject.
- b. The amount of any regular assessments or dues to which the lot is subject.

c. Whether there are any services that are paid for by regular assessments or dues to which the lot is subject.

d. Whether, as of the date the disclosure is signed, there are any assessments, dues, fees, or special assessments which have been duly approved as required by the applicable declaration or bylaws, payable to an association to which the lot is subject.

e. Whether, as of the date the disclosure is signed, there are any unsatisfied judgments against or pending lawsuits involving the lot, the planned community or the association to which the lot is subject, with the exception of any action filed by the association for the collection of delinquent assessments on lots other than the lot to be sold.

f. Any fees charged by an association or management company to which the lot is subject in connection with the conveyance or transfer of the lot to a new owner.

(2) The owners' association and mandatory covenants disclosure statement shall provide the owner with the option to indicate whether the owner has actual knowledge of the specified characteristics, or conditions or the owner is making no representations as to any characteristic or condition contained in the statement.

(c) The rights of the parties to a real estate contract as to conditions of the property of which the owner had no actual knowledge are not affected by this Article unless the residential disclosure statement or the owners' association and mandatory covenants disclosure statement, as applicable, states that the owner makes no representations as to those conditions. If the statement states that an owner makes no representations as to the conditions of the property, then the owner has no duty to disclose those conditions, whether or not the owner should have known of them.