

- SUBJECT:** Exempting real estate brokers and salespersons from the DTPA
- COMMITTEE:** Licensing and Administrative Procedures — committee substitute recommended
- VOTE:** 7 ayes — Hamilton, Quintanilla, Driver, Harless, Kuempel, Menendez, Thompson
- 0 nays
- 2 absent — Geren, Gutierrez
- WITNESSES:** For — Joe Knight, Texas Association of Realtors; (*Registered, but did not testify*: Daniel Gonzalez, Texas Association of Realtors)
- Against — Mark Kincaid, Texas Trial Lawyers Association; Joe Longley, Policyholders of America; Philip Maxwell; (*Registered, but did not testify*: Ware Wendell, Texas Watch)
- BACKGROUND:** The Deceptive Trade Practices-Consumer Protection Act (DTPA), which is contained in Business and Commerce Code, subch. E, protects consumers from false, misleading, or deceptive acts or practices, breaches of warranties, unconscionable actions, and certain violations of the Insurance Code.
- The DTPA contains an exemption for a claim for damages based on the rendering of a professional service, essentially the providing of advice, judgment, opinion, or similar professional skill. The exemption does not apply to:
- an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
  - a failure to disclose information if intended to induce the consumer into a transaction;
  - an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
  - breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
  - illegally promoting an annuity contract.

**DIGEST:** CSHB 2177 would exempt a licensed real estate broker or salesperson from a claim under the Deceptive Trade Practices-Consumer Protection Act. Claims arising from an unconscionable action or course of action that could not be characterized as advice, judgment, or opinion still could be brought against a real estate broker or salesperson.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. The bill would apply only to a claim arising from an act or omission that occurred on or after the effective date.

**SUPPORTERS  
SAY:**

A professional services exemption was added to the DTPA in 1995 to prevent ordinary professional malpractice claims from being brought under it. The intent was to protect professionals such as doctors, accountants, lawyers and real estate brokers. Instead of naming each profession, the exemption was structured as a conduct-based exemption. While malpractice claims under the DTPA have ceased for most professions, they continue to be brought against real estate brokers.

A real estate broker provides information about real property as part of his or her job. Claimants have urged that this information amounts to factual misrepresentation rather than professional advice, and trial courts often have agreed. The bill would protect real estate brokers from these unfounded lawsuits, as originally intended with the professional services exemption.

Most DTPA claims are won by real estate brokers at the appellate level. However, real estate professionals need a clear exception to discourage unfounded lawsuits and to empower courts to dismiss such claims before each side incurs substantial litigation costs.

If a consumer has a valid claim against a real estate broker, other claims still would be available, such as negligence or fraud in real estate transactions under ch. 27 of the Business and Commerce Code. Attorney fees are available for plaintiffs under the statute on fraud in real estate transactions.

**OPPONENTS  
SAY:**

CSHB 2177 would give real estate brokers a special exemption that would extend beyond the professional services exemption. If the bill truly intends to ensure that the professional services exemption protects real estate brokers, then the bill should mirror the language of the professional

services exemption and continue to allow claims for an express misrepresentation and failure to disclose information.

Individual professions should not be exempted from the DTPA. This would only encourage other professions to lobby for their own exemptions, leading to broad exceptions and narrow protections for consumers.

The ability to bring a negligence claim against a real estate broker is not adequate. The DTPA provides for attorney fees if the plaintiff prevails. This provides an incentive for lawyers to take on smaller, worthy claims. Attorney fees are not available for negligence claims, meaning that small claims against real estate brokers would be effectively foreclosed.

There is not ample evidence of frivolous claims against real estate brokers, nor is there justification for taking what is often a consumer's biggest purchase out of the DTPA. Real estate brokers already are protected from misrepresentation claims by affirming their reliance on information from another source, such as an appraisal district or the seller's disclosure. Real estate brokers also can recover attorney fees for groundless claims brought under the DTPA.

NOTES:

The substitute differs from the original by allowing a claim for an unconscionable action against a real estate broker or salesperson under the DTPA.

The companion bill, SB 1353 by Eltife, passed the Senate by 31-0 on April 20. The exemption in the Senate bill would not apply to an express misrepresentation, failure to disclose information, or unconscionable action. SB 1353 was reported favorably, without amendment, by the House Licensing and Administrative Procedures Committee on May 4 and recommended for the Local and Consent Calendar.