

August 8, 2012

Texas Department of Motor Vehicles
Via e-mail to DMV_FormalOpinions@TxDMV.gov.

Re: Broker's Prohibition Opinion Request

My name is Chris Ainsworth. I write to comment on the Broker's Prohibition Opinion Request as a prospective car buyer and as an interested citizen.

This opinion request turns on the meaning of "broker" under Chapter 2301 of the Occupations Code. A "broker" is someone other than the dealer, representative, distributor, or buyer.¹ A broker is someone who, in return for some consideration, arranges or offers to arrange a new car transaction.² But what does it mean to "arrange or offer to arrange" a new car transaction?

The word "arrange" could describe a variety of conduct. The Department has already construed "arranges or offers to arrange a transaction" to exclude advertising.³ Advertisers attract buyers to the dealership and influence the final sales price of the vehicle by soliciting offers at the MSRP. Without advertisements, many new car transactions would not occur at all. But even though advertisers cause new car transactions and influence their terms, advertisers are not brokers.

The Texas Administrative Code identifies buyer-referral services as a type of broker prohibited by section 2301.006 of the Occupations Code.⁴ A prohibited buyer-referral service might, for example, restrict referrals to certain dealers,⁵ charge per-transaction referral fees,⁶ or imply that buyers can receive a special, discounted price that cannot otherwise be obtained.⁷ A buyer-referral service is not a broker if it avoids these prohibited activities, even if it collects a participation fee from dealers.⁸

The Department has limited its construction of the broker's prohibition for good reason. Although advertisers and legally-operating buyer-referral services take some part in arranging transactions for dealers, they do not limit the options or information available to new-car buyers. The purpose of the statute, consumer protection, would not be furthered by preventing dealers from hiring advertisers or legitimate referral services.

¹ Tex. Occ. Code § 2301.002(3) (2011).

² *Id.*

³ See 43 Tex. Admin. Code § 215.84(a) (2010).

⁴ *Id.* § 215.84(b).

⁵ *Id.* § 215.84(b)(1), (2).

⁶ *Id.* § 215.84(b)(4).

⁷ *Id.* § 215.84(b)(6).

⁸ See *id.* § 215.84(b)(3).

The Department should continue to construe the statute conservatively. In enacting the broker's prohibition, the Legislature intended a just and reasonable result and favored the public interest over any private interest.⁹ Car dealers should not be given special treatment in the construction of the broker's prohibition. Prospective car buyers should be allowed to hire help when buying a car, just as dealers can hire advertisers to help sell cars.

Some people cannot buy a car without an employee's help. Business entities cannot buy a car except through an agent. Someone who cannot communicate in spoken English would likely require an employee to buy a new car. But buyers' agents are useful not only to business entities and people who don't speak English.

Buyers' agents can help level the playing field when it comes to information. A person who hires a buyers' agent is buying a service from an expert, not a car from a broker. Like car dealers, buyers' agents are involved in the new car business on a day-to-day basis. Car buyers, on the other hand, usually buy cars only every few years. Buyers' agents are thus more experienced at new-car negotiations and better informed about pricing. By closing this information gap, buyers' agents prevent dealers from profiting off the naiveté of consumers.

As an employee of the car buyer, a buyers' agent is bound by a duty of loyalty. This duty gives the buyer a legal remedy if the agent betrays the buyer by colluding with a dealer or other shenanigans.

Texans are proud of our consumer protection laws, but we don't want to see our government turn into a nanny state. The Department should not tie consumers' hands behind their backs in the name of consumer protection. Consumers should be free to hire employees. The Department should not construe the brokers' prohibition to apply to buyers' agents.

Respectfully,

Chris Ainsworth

⁹ Tex. Gov't Code § 311.021 (2011).