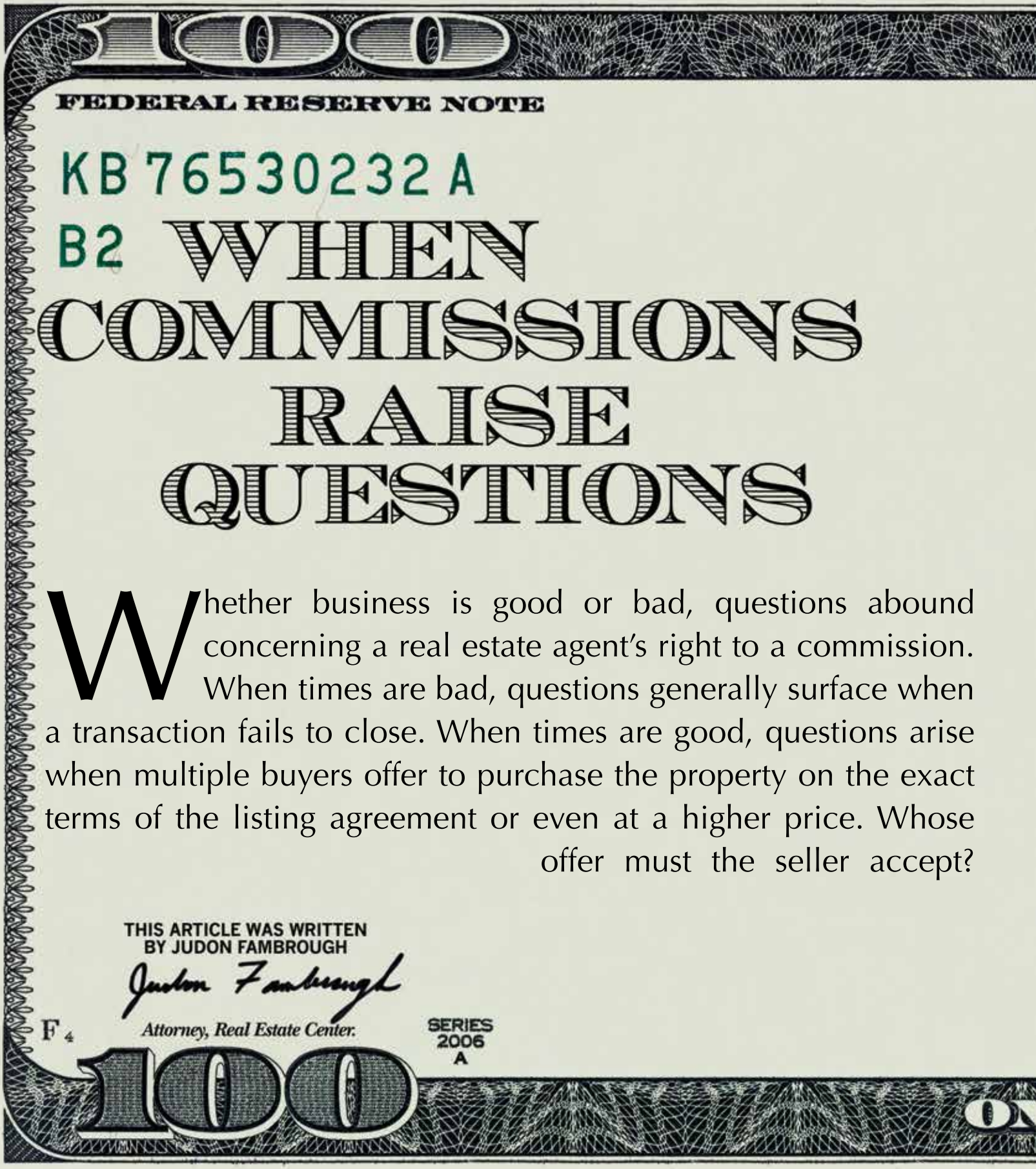
A Reprint from *Tierra Grande* magazine



WHEN COMMISSIONS RAISE QUESTIONS

Whether business is good or bad, questions abound concerning a real estate agent's right to a commission. When times are bad, questions generally surface when a transaction fails to close. When times are good, questions arise when multiple buyers offer to purchase the property on the exact terms of the listing agreement or even at a higher price. Whose offer must the seller accept?

THIS ARTICLE WAS WRITTEN BY JUDON FAMBROUGH

Judon Fambrough

Attorney, Real Estate Center.

There are no simple answers. The rules depend on the facts and especially on the terms of the listing agreement. Ordinarily, an agent earns a commission by procuring from the purchaser a valid, enforceable contract on terms satisfactory to the seller. With the signing of the contract, the seller, for the most part, accepts the buyer's readiness, willingness and ability to complete the sale according to the terms of the contract. However, if the seller rejects an offer containing the exact terms of the listing agreement, the agent's commission depends on the procurement of a ready, willing and able buyer to perform under the terms specified in the listing agreement.

Consequently, cases fall into two groups: one in which the seller signs the contract and the transaction fails to close, and the other when the contract is never signed. Of course, the devil is in the details in either situation. Many cases are fact specific and hard to generalize. The following attempts to summarize existing Texas case law.

If a controversy arises, the courts examine the type of listing agreement, duties placed on the agent within that agreement, fulfillment of the legal requirements promulgated by the Texas Real Estate Commission (TREC), the Texas statutes and case law.

LISTING AGREEMENTS

Generally speaking, there are three types of listing agreements: (1) nonexclusive (or open), (2) exclusive agency and (3) exclusive right to sell. With the first two, the licensee must be the procuring cause (or proximate cause) of a valid, enforceable contract between the buyer and seller based on the terms of the listing agreement or terms acceptable to the seller.

Texas case law defines *procuring cause* as "the event (that) produces the (required) result (the offer, contract or closing)

without which it would not have occurred." Some cases simply say the commission is earned when the agent is *instrumental* in bringing the buyer and seller together. Either way, there must be some reasonable or proximate relationship between the efforts of the broker and the eventual offer, contract or closing. In the end, the procuring cause is a question of fact for a jury, not a question of law for the court.

The nonexclusive (open) listing agreement obligates the seller to pay a commission to the agent who is the procuring cause of a valid, enforceable contract. The seller may retain more than one agent simultaneously. The seller is not obligated to pay a commission to any particular licensee when the seller or another real estate practitioner becomes the procuring cause.

The exclusive-agency listing agreement, as the name implies, allows the seller to list the property with one agent only. The seller is not liable for a commission, though, if the seller is the procuring cause of the contract.

Finally, exclusive right to sell entitles the listing agent a commission even though the seller or another agent is the procuring cause. Most, if not all, multiple listing services are of this type.

ENFORCEABLE CONTRACT

If the agent's commission is dependent upon the parties entering a valid, enforceable contract, what exactly does this entail?

While the cases give no precise definition, they do contain several examples of unenforceable contracts. For instance, if the contract calls for acts prohibited by law (an illegal act), the contract is unenforceable. Likewise, an option contract is not enforceable until the buyer or seller exercises the option. Until then, the agent is not entitled to a commission *unless the listing agreement states otherwise.*

If the contract contains one or more contingencies, such as the buyer's ability to obtain third-party financing or the sale of the buyer's home, the contract is not enforceable, and the agent is not entitled to a commission until the conditions are fulfilled or removed.

Finally, oral contracts and modifications raise some interesting legal questions. Generally, oral contracts render the agreement unenforceable under the statute of frauds. Oral modifications can represent counteroffers.

However, when the purchaser submits a contract to the seller on the exact terms of the listing agreement and the seller orally agrees to sell on those terms and conditions, the agent is entitled to a commission. The statute of frauds is a defense to specific performance sought by the buyer, but it is not a defense against the agent for a commission *(Mason v. Abel, 215 S.W. 2d 377).*

LEGAL QUALIFICATIONS

To earn a real estate commission, the agent must satisfy four legal requirements.

First, the person procuring the purchaser must hold an active real estate license obtained from TREC at the time the buyer is procured. The person need not have the license at closing.

Second, the promise or agreement for the sale or purchase of the property must be placed in writing, signed by the party charged with the obligation that contains the following:

- the name of the agent or broker to whom the commission is payable,
- the amount of or basis for computing the commission,
- the signature of the person charged with paying the commission and
- a description of the real property to be conveyed.

Third, when the sales contract is signed, the agent must notify the purchaser in writing that he or she should get an abstract opinion or title insurance for the property.

Fourth, the agent's performance for earning the commission must be rendered during the tenure of the listing agreement or possibly thereafter during a protection period if one is placed in the listing agreement.

The protection-period provision preserves the agent's right to a commission for a contract or sale that occurs after the listing agreement expires to a party contacted by the agent during the listing period. The length is negotiable and generally lasts 30 to 90 days. As a rule, the agents must provide the seller a list of the "contacts" shortly after the listing agreement terminates for this provision to apply.

The four requirements listed previously do not apply to an agreement to share compensation among licensees or limit a cause of action among licensees with business relationships (Texas Occupations Code, Section 1101.806[a]).

CONTRACTS WITHOUT CLOSINGS

As stated earlier, when the contract is signed by the seller, one of the problems faced by agents occurs when the sale fails to close. In such instances, are closings (consummations of the contract) a condition for earning the commission?

For the most part, the answer is no. Listing agreements, among other things, generally specify when the commission is earned, such as upon entering a binding contract, and when it is payable (at closing, if not before).

To earn a commission when the contract fails to close, the agent must prove the procurement of a *ready, willing and able* purchaser who could perform under the terms of the listing agreement and has offered to do so. Each of the terms expresses a distinct idea. Each of the three elements must exist for an agent to be entitled to a commission when an enforceable contract fails to close. Here is what each term entails according to case law.

The phrase *ready and willing* means the purchaser is mentally determined to consummate the transaction on the terms offered by the seller. The status is not altered if:

- the purchaser refuses to close because the seller's title is defective. (But, the agent must not be aware of the title defect at the time of the contract);
- the purchaser refuses to close because the seller cannot give possession on the date as promised;
- the sale did not close because the seller could not get the other co-owners to execute the deed;
- the seller sought to impose, but the buyer refused to accept, new conditions beyond those quoted in the listing agreement or
- the purchaser offered terms different from the listing agreement, but the seller later ratified them as satisfactory.

The purchaser was not *ready and willing* when, before the transaction reaches a binding status, he or she withdraws or asks for more time to consider the details.

Able means that the purchaser has both financial resources and legal capacity to consummate the transaction. As a general rule, once the binding contract is signed, the risk of the purchaser's financial ability rests with the seller.

Of course, when the contract is contingent on the buyer getting third-party financing, the property being appraised for a certain price or selling other property to raise funds, the rule is negated. Likewise, the agent is not entitled to a commission when he or she knows of the buyer's financial inability prior to the contract.

However, once the agent proves the procurement of a ready, willing and able buyer, it eliminates any question as to whether the contract is binding or whether a closing occurs.

SPECIAL CIRCUMSTANCES

Generally, when the purchaser defaults, the sales contract gives the seller two options. The seller may take the earnest money as liquidated damages or sue for specific performance (see "In Earnest," pub. 1952). If the contract limits the seller to liquidated damages only, the listing agent is not entitled to a commission upon default because the buyer never agreed to absolutely consummate the transaction.

However, if the sales agreement gives the seller the option to pursue specific performance, the agent is entitled to a commission based on the procurement of the contract even though the liquidated damages are accepted by the seller *(Steven v. Karr, 33 S.W. 2d 725).*

Sometimes the listing agreement specifies certain conditions for earning the commission other than closing or a binding contract. These special terms are controlling. For example, in *Elmore v. Wiley (478 S.W. 2d 137)*, the commission was conditioned on: (1) introduction of the buyer and seller, (2) the buyer agreeing to pay the commission and (3) the consummation of the sale. Here, the agent was the procuring cause of a contract but was denied a commission because the sale never closed.

By the same token, a commission may be earned even though the agent was not the procuring cause of a contract and did not find a ready, willing and able purchaser. In *Kaye v. Coughlin, 443 S.W. 2d 612,* the commission was earned by having called the purchaser's attention to the property during the listing agreement. This was an exclusive-right-to-sell listing agreement with the sale occurring during the protection period.

Where the sellers agree *to pay a commission out of the proceeds of sale,* the commission was not recoverable until the purchase money was paid unless the nonpayment is attributable to the seller's conduct *(Stafford v. Smith, 458 S.W. 2d 217).*

Finally, in *Campagna v. Lisotta, 730 S.W. 2d 382,* the agent was entitled to a commission only if lessee purchased property through the exercise of its right of first refusal during the tenure of the lease. The owner sold property to the lessee but without first receiving a written bona fide offer from a third party. The court ruled the agent was not entitled to a commission because the right of first refusal was never exercised.

BUYERS' BROKERS

Most of the case law focuses on the listing agent's right to a commission. Some case law addresses the buyer's agent's right to a commission. For example, in *Nugent v. Scharff, 476 S.W. 2d 414,* unless there is a buyer's agent involved in the transaction, the buyer is not liable for a commission when he or she refuses to consummate the contract, but the seller is.

If both the buyer and seller agree to share the commission, a refusal by one party to meet the terms of the contract gives the agent the right to collect the entire commission from the one who defaults *(Roberts v. Flower, 297 SW 339).* This case hints at dual representation.

MULTIPLE OFFERS: COMPETING AGENTS

When times are good, real estate agents face another dilemma. What should they do when multiple buyers submit offers conforming to the listing agreement or even offer more? Does the first conforming offer require the seller's acceptance? Generally, listing agreements do not address this question.

To understand the answer, the agent must recall that the listing agreement is not an offer from the seller to potential buyers in the traditional sense. Listing agreements are invitations to receive bids or offers. The seller is not bound legally to accept any offer from any potential buyer based on the listing agreement.

Consequently, the "first-in-time, first-in-right rule" does not apply. While it appears logical, it has no legal merit. However, as discussed earlier, a conforming offer from a ready, willing and able purchaser may entitle the agent to a commission.

Could the seller be liable for more than one commission if conforming offers are received from more than one ready, willing and able buyer? If ten conforming offers are submitted, is the seller liable for the other nine by accepting one?

In the context of an open listing, the seller is *not* liable for more than one commission. Here is how the case of *Briden v. Osborne (184 S.W. 2d 860)* describes it.

> The owner has a right to authorize more than one broker, each independently of the other, to effect a sale of his property; and, so long as he (the owner) remains neutral, he (the owner) ought to be permitted without incurring liability for commissions to more than one of them, to consummate the sale of the property through the one (the agent or broker) who first produces a person ready to buy it, whether the agent producing the purchaser is the one who first brought him (the owner) and the buyer together or not.
>
> Where there are (is) more than one independent broker involved, and it is shown that one broker introduced a prospective buyer to the seller and that afterward the sale was concluded by the aid of another broker, there is no *presumption* that either broker was the procuring cause of the sale. In such case the broker, seeking to hold the seller liable for a commission, must, unaided by any presumption, plead and prove he (the broker) was the procuring cause of the sale.

Open listings expose sellers to the possibility of paying more than one commission when the seller mistakenly tenders the commission to the wrong agent. As the court explains in *First National Bank v. Smith (141 S.W. 2d 735),* "Where an owner lists his land with several agents, he takes the risk of having to decide at his peril to whom he shall pay the commission." The seller's liability to the procuring broker is not discharged by paying the commission to another broker who was not the procuring cause.

So far, no case law addresses liability for multiple commissions when the sale does not close. As a rule, there can be only one procuring cause.

AGENT'S ROLE IN ADVISING CLIENTS

TREC, to some extent, provides guidance to agents when multiple offers are received. Title 22, Part 23, Subchapter N of the Texas Administrative Code (TAC), Rule 535.156(a) states, "A licensee shall convey to the principal all known information which would affect the principal's decision on whether or not to make, accept or reject offers. . . ."

What information might this be? The provisions of the Federal Fair Housing Act (42 USCA, Section 3604) entitled "Discrimination in Sale or Rental of Housing" is an example.

The act provides that ". . . it shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." The statute provides the same rules apply to handicapped buyers or renters.

The act defines a *handicapped* person as having "a physical or mental impairment which substantially limits one or more of (a) person's major life activities."

The federal mandate is restated somewhat in Rule 531.19 of the TAC entitled *Discriminatory Practices.* "No real estate licensee shall inquire about, respond to or facilitate inquiries about, or make a disclosure which indicates or is intended to indicate any preference, limitation, or discrimination based on the following: race, color, religion, sex, national origin, ancestry, familial status, or handicap. . . ."

What does this mean to sellers and agents attempting to decide whose offer to accept? Basically, the two must be neutral concerning the potential buyers' race, color, religion, sex, national origin, ancestry or handicap status. The decision-making process should be documented carefully to avoid the appearance of impropriety.

Offers are seldom alike even though based on the same listing agreement. They may contain certain contingencies such as being able to acquire financing or the sale of the buyer's present dwelling to raise funds. The proposed dates for closing and possession may vary. The amount of the down payment and the creditworthiness of potential buyers may differ. Some offers may exceed the asking price. All these factors should be taken into consideration.

Consequently, the decision-making process should be based on selecting the buyer who is most likely to reach closing in the shortest stated time with the fewest difficulties. Rule 535.16 of the TAC requires a broker under a listing agreement to negotiate the best possible transaction for the principal.

In the same manner, the agent or broker should avoid any appearance of impropriety when counseling the seller in the process. The TAC requires licensees to deal honestly and fairly with all parties.

Fambrough (judon@tamu.edu) is a member of the State Bar of Texas and a lawyer with the Real Estate Center at Texas A&M University.

THE TAKEAWAY

When a commission is earned and who receives it depends primarily on the type and terms of the listing agreement. Controversies may arise when a contract is signed but never closes and when a buyer is procured on the terms of the listing agreement and the seller refuses to sign the contract.

TEXAS A&M UNIVERSITY
REAL ESTATE CENTER

MAYS BUSINESS SCHOOL

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

http://recenter.tamu.edu
979-845-2031

Tierra Grande (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, $20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: Real Estate Center files pp. 1–5.

About the Real Estate Center

The Real Estate Center at Texas A&M University is the nation's largest publicly funded organization devoted to real estate research. The Center was created by the Texas Legislature in 1971 to conduct research on real estate topics to meet the needs of the real estate industry, instructors and the public.

Most of the Center's funding comes from real estate license fees paid by more than 135,000 professionals. A nine-member advisory committee appointed by the governor provides research guidance and approves the budget and plan of work.

Learn more at www.recenter.tamu.edu

WANTED

Outstanding Texas Photos

Deadline: 5 pm, Sept. 1, 2013

Enter our contest for a chance to have your photo included in the Real Estate Center calendar.

For contest details, go to http://recenter.tamu.edu/photocontest.

El Capitan, Guadalupe Mountains National Park, by previous winner Guy McCrary

RECON

Real estate news Real fast

recenter.tamu.edu/recon

REAL ESTATE CENTER
TEXAS A&M UNIVERSITY