

## Mobilehome Update: It has been lawful for dealers to cooperate with brokers since 1998. But is that working out?



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Going back three decades, this is my fourth article on the subject of a Department of Housing and Community Development licensee (Dealer) and Department of Real Estate licensee (Broker) co-operating to split commissions on the sale of a used manufactured home/mobilehome (MH unit) that has been registered with HCD. It certainly has not been a boring topic.

Some misleading material has been published by the industry that confused Brokers, Dealers and escrow agents alike. Seeking clarity on the issue of Dealer/Broker cooperation, California Manufactured Housing Institute's (CMHI) Executive Director, Jess Maxcy, met with HCD staff in Sacramento last August. The definitive answer sought by Jess on behalf of CMHI was: "When can a Dealer co-op with a Broker without being subject to the requirements of Section 18035 of the Health and Safety Code?" The answer was, Never! A Dealer is always in the chain of title. The Dealer is identified as the 'Seller' in the §18035 Health and Safety Commission escrow instructions and related purchase documents.

The following are some questions and answers to help you understand the significance of this answer:

**Q:** Can a Broker and a Dealer cooperate on the sale of a MH unit?

**A:** Yes. It became lawful for a Dealer to cooperate with a Broker in 1998 when

Senate Bill 259 by Senator Haynes took effect. The subject MH unit must be registered with HCD. 'Registration' means recordation by HCD of the title information contained in an application for registration, which means Dealers and Brokers cannot cooperate on the sale of a new MH unit.

**Q:** Does that mean a Dealer/Broker cooperative sale would conform to both DRE and HCD law?

**A:** No. The respective legal processes governing Dealers and Brokers are vastly different. The transactional differences between the two make it impossible to comply with both sets of laws at the same time. The law governing cooperative sales between a Dealer and Broker is Dealer law such as found in Division 13, Part 2, of the Health and Safety Code. Within that body of law is Section 18035 Health and Safety Commission, which contains a code specified escrow law.

**Q:** So how do Dealers and Brokers cooperate?

**A:** If someone licensed only as a Dealer cooperates with a Broker, the sale is subject to §18035 Health and Safety Code and the Dealer must control the sale. The Dealer is charged with the responsibility of controlling the transaction and making sure the sale conforms to HCD law. The Dealer is identified as the 'Seller' in the escrow and purchase documents. The Dealer is al-

lowed to pay, and the Broker is allowed to receive, a 'referral fee' even though the Broker has performed a function that required a DRE license. {NOTE: For more information, read Senator Haynes' Letter to the Senate Journal included at the end of this article.}

Q: Why was HCD law chosen over DRE law as the regulatory process of choice?

A: Both the California Association of Realtors (CAR) and HCD expressed opinions on this issue. Both parties agreed that such transactions should only be covered by one body of law. CAR recommended DRE law because it annually protected hundreds of thousands of real property homes. HCD said the rights of the consumer were far greater under HCD law. HCD prevailed.

Q: If the buyer, seller, Dealer and Broker all agreed, could a Dealer and Broker each process their end of the deal according to HCD and DRE law respectively?

A: No. As already stated, it is impossible to comply with both regulatory schemes at the same time. There are unavoidable conflicts that cannot be waived.

Q: What are some of those conflicts?

A: Examples of some conflicts are:

1. Dealers are in the chain of title; they guarantee title like an automobile dealer (DMV dealer law was the genesis for HCD dealer law). Brokers act only as agents.
2. The rights of consumers differ significantly depending upon whether HCD law or DRE law is applied. A few examples are: under DRE law a buyer and seller can agree to liquidated damage clauses; early releases of funds from escrow; or waive the creation of an escrow. All three of these actions violate HCD law.
3. Remedies for the consumers differ depending upon which body of law governs the transaction.

4. A 'secured party' (i.e. a 'legal owner or junior lienholder) is required to deliver their original title document and a HCD 'Conditional Release of Interest' form prior to the payoff of their liens if the escrow is governed by HCD law (§18035(d) Health and Safety Commission). In all other instances a secured party is not required to deliver their original title to escrow until after receiving payment in full of the unpaid balance due on their loan.
5. HCD law prohibits any provision in an agreement that waives the buyer's rights. Any waiver is deemed contrary to public policy and is deemed void and unenforceable.

Q: Why is a Dealer regarded as the seller when the MH unit is still owned by the registered owner and what is the significance of that fact?

A: HCD has said that simultaneously to when the buyer has paid the pur-

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chase price and accepted delivery of the home, and the conditions of escrow have been met, title to the home automatically passes to the dealer for a brief instant in time, thereby enabling the dealer to have the ability to close the escrow, report the sale and guarantee title. At close of escrow the Dealer was the seller. The Dealer and purchaser mutually executed a code specified receipt for deposit (see §18035.1 Health and Safety Commission), a purchase order, conditional sales contract, or other document evidencing the purchase contemporaneous with, or prior to, the receipt of any cash from the purchaser. All payments toward the purchase shall only be made payable to the escrow agent.

Q: A common school of thought is that an escrow agent only accepts instructions. Assuming that is true, do escrow agents have to be concerned with making sure the escrow instructions they prepare comply with MH unit escrow law?

A: Yes. Several years ago Deputy Attorney General Michael Botwin answered this question when he caused an article to be published in "CEA News." The subject of the article concerned a popular escrow agent that complied with the instructions of her principals on the sale of a new MH unit. Those instructions did not comply with the mobilehome escrow law (§18035 Health and Safety Commission). Instead funds were released early and the buyer suffered damages. The Dealer fled. The AG filed suit against the escrow agent. The escrow agent paid the buyer's damages and went out of business. That said, probably the greatest exposure to litigation for an escrow agent derives from civil litigation initiated by consumers or lenders, not government enforcement agencies. Therefore, it may be wise to have a discussion with your attorney prior to 'accepting' instructions that do not conform to the law.

Q: For the protection of a Broker's client, wouldn't it be better if the Broker continued their involvement with the transaction until the close of escrow?

A: At first blush this sounds good. But the fact is that Brokers probably know no more about HCD law than Dealers know about DRE law. This supports the notion that the only fair thing to do is to excuse the Broker from any further duty once an offer is accepted. The Broker gets referral fee, which seems to imply the Broker has minimal exposure to a valid complaint.

Q: What procedure should a Broker follow when an offer is about to be made involving a Dealer co-op?

A: You have a duty to disclose to your client that the pending offer involves a Dealer and if the offer is accepted, you will be required to excuse your-

self from further participation in the progression of the transaction since the sale must be handled by the Dealer pursuant to HCD law. You may add that you will receive a referral fee.

Q: Can someone who is dual-licensed as a Dealer and a Broker cooperate with another Broker pursuant to DRE law instead of HCD law?

A: Yes. Someone who is dual-licensed is not required to use one license or the other. The forms and actions used by the dual-licensee dictate which license is in play. Hence, it is possible that someone who is licensed as a Broker can cooperate pursuant to DRE law with someone who is dual-licensed. ■



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### MOTION TO PRINT IN JOURNAL

Senator Haynes moved that the following letter be printed in the Journal.  
Motion carried.

January 16, 1998

The Honorable Bill Lockyer  
President Pro Tempore  
State Senate

Dear Mr. President and Members of the Senate: On September 21, 1997, the Governor approved Senate Bill 259 (Chapter 423 statutes of 1997), introduced by Senator Haynes, pertaining to manufactured homes. I am submitting this letter to the Senate Journal to clarify the intent of Section 1 of that bill, which amended Section 18040 of the Health and Safety Code, regarding cooperative agreements for the resale of manufactured homes between manufactured housing dealers and real estate licensees.

The intent of this amended section is to permit manufactured housing dealers to pay real estate licensees a fee for the referral of business on the resale of manufactured homes. However, dealers are regulated pursuant to sections of the Health and Safety Code, while real estate licensees are subject to provisions in both the Civil Code and Business and Professions Code. The different codes have very different regulatory schemes governing the sale of property. Hence it is important to clarify that while Section 18040 of the Health and Safety Code now permits cooperative arrangements for the resale of manufactured homes, it was not the intent of the bill to change the governing statutes for the sale and resale of manufactured homes. Thus, so far as the provisions of SB 259 are concerned, any resale of a manufactured home accomplished through a cooperative brokerage arrangement between a manufactured housing dealer and a real estate licensee is still governed by the provisions contained in the Health and Safety Code.

Sincerely,

Raymond N. Haynes

### California Health And Safety Code Section 18040.

(a) With respect to the sale of any manufactured home, mobilehome, or commercial coach that has not been previously

installed on a foundation system pursuant to Section 18551, a dealer may solicit or obtain listings, engage in the multiple listing only with other dealers, or engage in payments only to other dealers or groups of dealers, pursuant to cooperative brokering and referral arrangements or agreements on the sale of only a manufactured home, mobilehome, or commercial coach which has been titled by the department.

(b) With respect to the resale of any manufactured home or mobilehome that has not been previously installed on a foundation

system pursuant to subdivision (a) of Section 18551, a dealer may solicit or obtain listings, engage in multiple listing, or engage in payments with other dealers, groups of dealers, or with real estate licensees licensed pursuant to Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code.

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