

HB 102

REVISE REGULATION OF PERSONS INVOLVED IN REAL ESTATE TRANSACTIONS

BY REQUEST OF THE BOARD OF REALTY REGULATION

SPONSOR - REP. RANDALL PINOCCI HD 19

CONTACT

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SUMMARY OF CHANGES

Section 1 - Include 'asset management' within the definition of 'broker'

(when the person both manages and markets Montana real estate)

The problem arises in the context of foreclosed or distressed real estate. Asset managers are a new professional class that has sprung up as a result of the housing foreclosure rates. Typically, they manage property for financial institutions that have repossessed property. Sometimes they go beyond mere management and actually market the property too. The institution -not the asset manager - is the true owner of the property. By Montana law, a Montana licensee is required to ascertain the true owner of a property before brokering it and to reveal any material facts about the property that are known to the licensee. Montana real estate licensees are exposed to liability for negotiating transfers of property with persons who are not the true owners of the property. However, the unlicensed persons are under no obligation to comply with

the same laws. They have been known to hide material defects about properties and to also hide the name of the true owner. When confronted about this, licensees have been told that the asset managers don't have to comply with Montana law, and are only bound by federal HUD law.

This proposed language states that asset management is, in fact, real estate brokering if the asset manager is marketing the property. As such, a real estate license is required to manage and market properties for others (including doing it for financial institutions). The language will not allow the board of realty regulation to regulate asset managers, per se. The board will only be concerned if asset managers step out of their real role and try to do the things that require a broker license i.e. market the property.

Section 1 - Clarify the definition of 'property manager'

The Board of Realty Regulation regularly receives questions from consumers as well as licensees about whether a particular activity is property management or not. The current definition of 'property manager' is very vague. It uses itself to define itself. It does not identify the actions that are property management. Essentially, it says that property management is any act performed for compensation in the

leasing of property. Therefore, it is difficult for people to determine if a business model requires a license or not. This change gives licensees and consumers specific information that will allow them to identify whether someone is acting as a property manager or not and whether or not a license is needed.

Section 1 - Clarify the definition of 'negotiations'

Part of the definition of 'broker' includes someone who is engaging in 'negotiations'.

Currently, the definition of 'negotiations' is:

"Negotiations" means: (emphasis added)

- (a) efforts to act as an intermediary between parties to a real estate transaction;
- (b) facilitating and participating in contract discussions;
- (c) completing forms for offers, counteroffers, addendums, and other writings; and
- (d) presenting offers and counteroffers.

The definition lists the activities in the conjunctive ('and'). Therefore, the definition seems to say that a person is only 'negotiating' when they perform ALL of the activities. If so, that would mean that a person could perform all of the activities except one and would therefore not be negotiating.

If they aren't negotiating, they aren't brokering and would not be required to have a real estate license.

The board has always interpreted the law to mean that a person who does some but not necessarily all, of the activities



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SUMMARY OF CHANGES *CONTINUED...*

described in the definition of 'negotiations', may nevertheless be determined to be brokering. This bill substitutes the word 'means' with 'includes' in the definition of 'negotiations'. That change will demonstrate that "negotiations" may include

Section 1 - Fixing an error in MCA 37-51-102(4)(d).

It is believed that retention of some of the language in MCA 37-51-102(4)(d) was a clerical error. MCA 37-51-102(4)(d) was intended to define 'seller brokers' and MCA 37-51-102(4)(e) was intended to define 'buyer brokers'. However, as written, 37-51-102(4)(d) defines a seller broker as one who acts on behalf of sellers AND on behalf of buyers AT THE SAME TIME. This is because the operative language describing a buyer broker - "and who aids, attempts, or offers to aid, for a fee, any person in locating or obtaining any real estate for purchase or lease" - is included at the end of (4)(d)

any of the listed activities but the actor need not necessarily perform all of them before the actor is considered to be negotiating.

and is then repeated exactly in (4)(e) which applies to buyer brokers. The language should only be in (4)(e). Leaving it in (4)(d) creates confusion and results in (4)(d) only applying to dual agents when the intent of that portion of the definition was to apply only to seller brokers. (Dual agents are already defined elsewhere in statute.) Further, leaving the language in (4)(d) results in no definition of a true seller broker. Deleting the language from (4)(d) will result in two clear sections: one of which defines seller brokers [(4)(d)] and one which defines buyer brokers [(4)(e)].

Section 2 - Clarify that a property manager license is required to lease real estate in Montana and that the licensing provisions do not apply to certain persons.

Section 3 - Require a Montana real estate license to buy or sell Montana real estate.

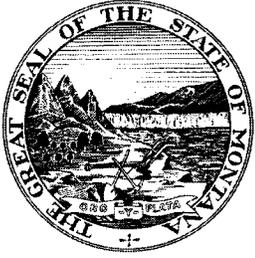
This change will help avoid injury to Montana citizens and licensees by dissuading unlicensed out-of-state persons from practicing real estate in Montana. Numerous out of state persons have engaged in the practice of real estate in Montana regarding Montana real estate. These persons may or may not be licensed in another jurisdiction but, regardless, they do not have a Montana real estate license. Although current law does require a license to practice real estate in Montana, often these same out-of-state persons argue that they don't have to have a Montana real estate license because they do not physically enter the state of Montana even though the subject property is located in Montana. At the same time, many consumers in Montana or elsewhere do not realize that a person who is brokering Montana real estate must have a Montana real estate license. Those consumers might unwittingly retain an unlicensed person as their agent.

The board believes that law currently requires a license

to broker Montana real estate. However, without a clear statement that a license is required to broker Montana real estate, the Board continues to see out-of-state unlicensed persons who do not believe they need a Montana license because they do not physically enter the state of Montana. Unlicensed persons who do not follow the same laws and rules that a Montana licensee must observe, run the risk of physically or financially injuring Montana citizens as well as Montana licensees. Since these out-of-state persons are not licensed in Montana, the Montana Board of Realty Regulation has no jurisdiction over them and no ability to protect Montana citizens. Should someone be injured, there is also less ability for the injured person to obtain a remedy for themselves since the parties may disagree over venue. This change will be a clear statement to out-of-state persons and the consuming public of Montana, that a person who is brokering Montana real estate must have a Montana real estate license.



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SUMMARY OF CHANGES *CONTINUED...*

Section 4 - Clarify that Montana licensees may not compensate unlicensed property managers who perform the acts of a licensee regarding the lease of real estate in Montana

This change will clarify that a Montana licensee is prohibited from compensating unlicensed or out-of-state persons to perform the acts of a property manager licensee with regard to real estate in Montana. The prohibition already exists with regard to brokers and salespeople. This amendment adds

'property manager' to that prohibition. Allowing Montana licensees to compensate unlicensed persons for performing the acts of a licensee amounts to assisting in the unlicensed practice of a profession.

Section 5 - Provide that a licensee who is acting as an agent is obligated to comply with duties/disclosure/agency requirements whether or not the agent has a written agency agreement

Both a buyer agent and a seller agent are required to obtain the appropriate written agency agreement with their client before they begin acting as an agent. The agreement provides various required disclosures and obligations of the agent both to the agent's clients and to other agents. Some real estate agents do not obtain the written agreement until long after they have begun acting as an agent. Some have even waited until the date of closing the real estate transaction. Without the written agreement there is no memorialization

of what the agent is supposed to be doing for the client. A recent administrative decision even determined that an agent was not subject to the various obligations of all agents if the 'agent' had not entered into a written agreement. In effect, the 'agent' couldn't be held to anything because the agent had neglected to obtain the required written agency agreement. Nevertheless, that agent had in fact acted as an agent and the client alleged injury cause by the agent's actions.

Section 6 - The requirement to have a property manager license is deleted from this section of law and moved to MCA 37-51-103. Amendments further clarify that certain persons are exempt from property manager licensing.



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