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## **The Commission Escrow Act - A New Tool for Brokers of Residential Real Estate Real Property Law Section 294-b**

Governor Patterson signed into law The Commission Escrow Act ("the Act") enabling a broker to require that a disputed commission amount in a residential transaction (whether related to sale or lease) be deposited in an escrow account. The law takes effect as of January 1 2009.

### Prerequisites:

- \* The Brokerage Agreement should be in writing.
- \* The Brokerage Agreement must include specific language in conspicuous and bold type.

### Requirements under Section 294-b of the Real Property Law:

- \* Any broker who has completed services under a Brokerage Agreement should **file an Affidavit of Entitlement** to commission with the appropriate recording officer (County Clerk) of the county in which the real estate property is located.
- \* Within 5 business days of such filing, the broker must **serve seller or lessor** ("Owner") **with notice**, by registered or certified mail, return receipt requested or by personal delivery, to the address listed in the Brokerage Agreement. If there are multiple Owners, service upon one is sufficient for compliance.
- \* If closing is to occur within five (5) days of the filing of the affidavit, the broker must serve the Owner by personal delivery.
- \* If the Owner is represented by an attorney and has provided the attorney's contact information, the broker must **provide a copy of the affidavit to the Owner's attorney** by either mail, fax, e-mail or personal delivery within five (5) days of the filing of the affidavit. However, failure to do so will not result in the forfeiture of the broker's rights under the Act.
- \* If the Owner refuses to pay the amount at the closing, then the Owner must deposit the disputed amount (or the balance of the purchase price, whichever is less), into escrow with the County Clerk.
- \* The County Clerk must deliver the money to the country treasurer, where it remains until an order for payment is entered by a court or until the parties have agreed in writing on its disposition.

\* The broker must commence an action within six (6) months of the date of the escrow deposit.

Rights of the Parties:

\* If within sixty (60) days of the date of the escrow deposit, broker has not commenced an action, the Owner may petition the court to have the money returned to seller.

Repercussions for failure to comply:

\* If the Owner fails to pay the commission and the broker ultimately succeeds in his or her claim, the broker is entitled to the amount of commission due, plus costs, filing fees, and reasonable attorney fees.

Important Legal Issue:

\* The Act does not create a lien or encumbrance. The escrow accounts itself, or an Owner's failure to comply with the Act, does not create nor constitute a lien in favor of the broker. A violation of the Act will not invalidate a transfer of property and will not prevent a subsequent buyer from taking good title to the property.

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