

S B

537

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: April 2, 1984

REQUEST

Bill/Resolution No.: SB 537  
Title: An Act relating to the real estate surety fund  
Sponsor: Labor, Commerce & Finance  
Requestor: Legislature  
Date of Request: March 28, 1984

FISCAL DETAIL

Agency Affected: Real Estate Commission  
Program Category Affected: Consumer Protection  
BRU, Program or Subprogram(s) Affected: Real Estate Commission/Dept. of Comm. & Econ. Dev.

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES			57.0	70.0	75.0	75.0
200 TRAVEL			3.0	5.0	5.0	6.0
300 CONTRACTUAL			1.0	1.0	1.2	1.2
400 SUPPLIES			0.4	0.5	0.5	0.7
500 EQUIPMENT			1.0	-0-	-0-	-0-
600 LAND & STRUCTURES			-0-	-0-	-0-	-0-
700 GRANTS, CLAIMS			-0-	-0-	-0-	-0-
800 MISCELLANEOUS			-0-	-0-	-0-	-0-
TOTAL OPERATING			72.4	76.5	81.7	82.9
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND			60.0			
FEDERAL FUNDS						
OTHER SURETY			12.4			
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

- NOTE: 1. Fund payments reduced by 30,000 - 70,000 per year.  
2. Current case load will be handled in FY '85 under existing law. Savings will result in FY '86.

ANALYSIS: Attach a separate page for analysis

Prepared By: James L. Magowan, Executive Director Phone: 563-2169  
Division: Real Estate Commission Date:

Approved by Commissioner: Richard A. Lyon Date: 4/2/84  
Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):

Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)

12/1/83



OFFICIAL BUSINESS

ALASKA STATE LEGISLATURE - SENATE  
COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON  
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811  
(907) 465-3844

MEMORANDUM

TO: Dick Monkman  
Assistant Attorney General

FROM: Senator Dick Eliason, Chair  
Senate Labor and Commerce Committee

DATE: April 6, 1984

RE: "White Paper" from Alaska Association of Realtors

SB 537, "An Act relating to the real estate surety fund", is presently under consideration by the Senate Labor and Commerce Committee. This legislation incorporates the suggestions proposed in the "White Paper" prepared by the Alaska Association of Realtors.

As the Real Estate Commission has requested further analysis of the proposal before formulating a position on SB 537, the Senate Labor and Commerce Committee decided to defer action until the review process is complete. This committee is very much interested in your comments regarding this "White Paper".

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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SUITE 200  
ANCHORAGE, ALASKA 99501  
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100 CUSHMAN ST.  
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POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

April 24, 1984

James L. Magowan, Executive Director  
Alaska Real Estate Commission  
3601 C Street Suite 722  
Frontier Building  
Anchorage, AK 99503

Re: Alaska Association of Realtors  
"White Paper" on the surety  
fund

Dear Mr. Magowan:

At your request on behalf of the Real Estate Commission, we have reviewed the White Paper dated March 5, 1984, by the Alaska Association of Realtors pertaining to the real estate surety fund. Some of the comments and concepts advanced by the Alaska Association of Realtors in the White Paper are now embodied in proposals before the 13th Legislature, specifically HB 705 and SB 537.

The current real estate surety fund claims program as outlined in AS 08.88.450 et seq. has benefited hundreds of Alaskan consumers and real estate professionals since it was enacted in 1980. The program has provided a swift, inexpensive, and fair method of resolving many real estate sales disputes. It has allowed hundreds of consumers to bring their grievances before a qualified, impartial tribunal without the frustration, delay and high cost of going to court. In our view, the program has given a measure of protection to consumers while providing real estate professionals with a full and fair opportunity to contest the merits of any claim made against the surety fund. The existing surety fund has done much to enhance the public trust and confidence in the real estate profession in general, a goal we support and encourage.

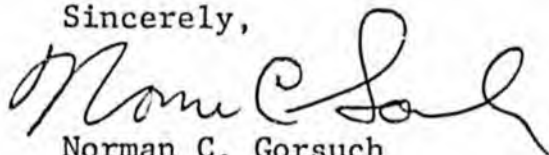
To be sure, the surety program could be improved in some respects. I agree with the point made by the Alaska Association of Realtors that some means must be found to reduce frivolous claims against the surety fund. It is my belief that frivolous claims can be essentially halted by imposing a significant

filing fee, perhaps up to \$150, to be paid by each claimant prior to processing a claim against the surety fund. If the claimant does not prevail, then the filing fee would be lost. Such a filing fee would most likely chill frivolous claims without unnecessarily impeding valid claims made against the fund.

I recognize that this is a policy call rather than a legal determination. I would therefore simply urge the commission to carefully weigh the effects of the approach taken in the White Paper and by the two pending bills and carefully consider their effects on both the real estate consumers and on the real estate profession. As a general rule, I am not enamoured with placing more disputes in our already overworked judicial system. Of course, any aggrieved party from a real estate surety fund proceeding does and ought to have the ability to appeal the findings and award to a superior court.

If we can be of additional assistance to the commission concerning any aspect of the surety fund, please contact us.

Sincerely,



Norman C. Gorsuch  
Attorney General

NCG:eer

cc: The Honorable Dick Elaison,  
Senator

The Honorable Jalmar Kerttula  
President of the Senate

The Honorable Joe Hayes  
Speaker of the House

Ray Gillespie  
Special Staff Assistant  
to the Governor

The Honorable Dick Lyon, Commissioner  
Department of Commerce and Economic Development

# MEMORANDUM

# State of Alaska

TO: Dick Monkman  
Assistant Attorney General  
Dept. of Law

DATE: March 9, 1984

FILE NO:

TELEPHONE NO:

FROM: James L. Magowan  
Executive Director  
Alaska Real Estate Commission

SUBJECT: Re: Attached White Paper  
from Alaska Association  
of Realtors

The attached "White Paper" has been presented to the Commission. The Alaska Association of Realtors favors immediate action to implement the recommendations of this paper and it has asked the Commission to join the Association in supporting inclusion of these provisions.

The Commission did not act to do this because it wanted to get more information before acting. The first action by the Commission is to request your comment and input on the recommendations of the Association.

JLM/cw/0702C9

RECEIVED  
Department of Law

MAR 12 1984

Office of the Attorney General  
Anchorage Branch  
Anchorage, Alaska

To: Alaska Real Estate Commission

From: Alaska Association of REALTORS

Date: March 5, 1984

This is Part 1 of the industry response to the request from the Commission at their January 1984 meeting for recommendation of needed changes in the relevant statutes, regulations and operating procedures. It addresses only the Surety Fund, and is drafted so that pages 1-11 may be lifted for use by the Commission and Association in approaching the legislature. Pages 12 & 13 are recommended as a briefing and instruction sheet for hearing officers of surety fund claims under the existing statute and regulations.

The remainder of the real estate statute and corresponding regulations will be reviewed and subsequent parts of this white paper will detail to the Commission

- 1) the content recommendations
- 2) the rationale for the recommendations
- 3) the suggested action to accomplish, i.e. propose a statute change, amend the regulations, or adopt an operating procedure.

## History

From its creation in 1964, as reflected in AS 08.88, the Real Estate Commission's primary purpose has been the protection of the public through the examining and licensing of real estate practitioners. Through 1975, the public's guarantee of monetary relief was a required bond in the amount of \$1000/Salesman and \$5000/broker.

Through the early '70's there were few claims against the bonds; however, the industry realized that the bonding level was not adequately protecting the public's interests. Following the example of twelve other states, (Footnote: 1974 NARELLO Report, page 25) the industry together with the Real Estate Commission actively lobbied for the 1974 legislation (Attachment A: 45.85.010-110 & 08.38.281, .071, & .401) to create a surety fund with a two-fold purpose:

1) to provide indemnification up to \$10,000/transaction for judgments awarded by the courts to persons who suffered financial loss because of a licensee's actions that involved fraud, deceit, misrepresentation, or conversion of trust funds, and

2) to provide funding for real estate education of both the public and the licensees from funds collected in excess of the specified \$250,000 minimum balance in the fund.

The 1974 legislation, which was patterned after the California model, required court action and a judgment against a licensee prior to any disbursement of Surety Fund dollars. However, Alaska's enacted version did not require an attempt to collect money from or attach the assets of the named licensee, nor did it provide for any review by the Commission prior to payment from the fund.

--- Thus from the 1976 license renewal cycle when the first fees were paid into the surety fund, judges were able to order payment directly from the fund to satisfy a judgment.

These conditions were in effect until 1980 when the statute was amended, initiated by the Legislative Audit Committee during the Sunset Review, to charge the Real Estate Commission with the responsibility to both hear cases and award payments but without ensuring the full protection of due process and judicial precedent (Attachment B).

The use of hearing officers (as allowed by the Administrative Procedures Act) starting in January 1982 and the regulations adopted by the Commission in December 1982 (effective April 1983) have further attempted to work within the current statute (Attachment C).

- Attachments: A) 1974 Surety Fund Statute  
B) 1980 Amended Surety Fund Statute  
C) 1982 Surety Fund Regulations

### Current Situation

The real estate industry in Alaska consists of some 4000 licensees who support sensible legislation to regulate the industry and to protect the public against illegal real estate practices. This sense of professional responsibility has not changed throughout the 20-year historical summary period outlined above.

Currently there are no filing fees or costs if a claim is denied, nor is the claimant required to exhaust other remedies before receiving satisfaction from the Surety Fund. Thus, the "no-risk" and "no-costs incurred" status of claimants simply encourages claims. Further, the state entity, either contracted or appointed, is in the position of being both judge and jury.

It is the consensus of the industry that a concentrated effort must be made immediately to restore the integrity of the surety fund, both in concept and in actual administration.

### Points to Achieve

1. Ensure the rights of all parties to due process through the court system with the determination of a claim's validity and resultant damage assessment in the courts.
2. Maintain the Surety Fund as a resource to be drawn upon only when funds are not collectable from the judgment debtor by any other means.
3. Charge the Real Estate Commission with the responsibility of timely license action on the licensee whose action has resulted in a draw from the Fund.
4. Direct the Real Estate Commission to provide quality education programs to licensees and the public as to licensees' responsibilities under the real estate statutes and regulations.

Means to Achieve

The following is proposed to be introduced as an amendment to HB 389.

Add a Section 11: Article 5 (AS 08.88.450-500) is amended so that in its entirety it would read:

Sec. 08.88.450 Real estate surety fund. There is created a special account in the general fund known as the real estate surety fund to carry out the purposes of this chapter. The fund shall be composed of payments made by licensed real estate brokers and salesmen under AS 08.88.455. The fund may not exceed \$500,000 and amounts in the fund in excess of \$250,000 may be appropriated for real estate educational purposes as provided in AS 08.88.091. (1 ch 148 SLA 1974, am 34 ch 167 SLA 1980; AS 45.85.010)

NO CHANGE

AS 08.88.455 Payments by real estate brokers and salesmen.

(a) A licensed real estate broker, associate broker, of salesman when obtaining or renewing a real estate license, in lieu of obtaining a corporate surety bond, shall pay to the commission in addition to the license fee, a Surety Fund fee not to exceed \$125. After the fund reaches \$250,000, the commission shall by regulation adjust the bond fees so that, taking into account anticipated expenditures for claims against the fund and real estate educational purposes, the fund is maintained at a level not less than \$250,000.

Already in CSHB389 for equalization of fee structure.

(b) All fees collected under this section shall be paid at least once a month by the commission into the general fund. These payments shall be credited to the real estate surety fund. (1 ch 143 SLA 1974; am 35 ch 167 SLA 1980; AS 45.85.020)

AS 08.88.460 Claim for payment.

(a) When any aggrieved person obtains a final judgment in any court of competent jurisdiction against any person or persons licensed under AS 08.88, under grounds of fraud, deceit, intentional misrepresentation or conversion of trust funds, arising directly out of any transaction when the judgment debtor was licensed and performed acts for which a licensee is required under AS 08.88, the aggrieved person may, upon the judgment becoming final, file a verified application in the court in which the judgment was entered for an order directing payment out of the Real Estate Surety Fund of the amount of actual and direct loss in the transaction up to the sum of ten thousand dollars (\$10,000) of the amount unpaid upon the judgment.

In the case of a small claims court judgment, the aggrieved person shall file the verified application in the district court in which the judgment was entered in favor of the aggrieved person. The court shall then make a determination as to whether the small claims court judgment was based on facts constituting grounds for recovery under this section and may enter an order directing payment of the small claims court judgment out of the Real Estate Surety Fund.

A copy of the verified application shall be served upon the commission and the judgment debtor and a certificate or affidavit of that service filed with the court.

(b) Nothing in this section shall be interpreted to authorize payment from the Real Estate Surety Fund for transactions or events which solely involves innocent misrepresentation on the part of a real estate licensee.

(c) Application for payment from the fund shall be made within one year from the date that the judgment becomes final.

AS 08.88.465 Time for action by court on application for payment: required showing of person aggrieved.

NEW (a) The court shall conduct a hearing upon such application 30 days after service of the application upon the commission. Upon petition by the commission and showing of good cause, the court may continue the hearing for such further period as it deems appropriate. At the hearing, the aggrieved person shall be required to show that:

(1) he is not a spouse of the debtor, or the personal representative of such spouse.

(2) he has complied with all requirements of this article.

(3) he has obtained a judgment as set out in AS 08.88.460, stating the amount thereof and the amount owing thereon at the date of the application.

(4) he has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets, liable to be sold or applied in satisfaction of the judgment.

(5) he has discovered no personal or real property or other assets liable to be sold or applied, or that he has discovered certain of them owned by the judgment debtor and liable to be so applied, and that he has taken all necessary action and proceedings for the realization thereof, and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment.

(6) he has diligently pursued his remedies against all the judgment debtors and all other persons liable to him in the transaction for which he seeks recovery from the Real Estate Surety Fund.

(7) he is making said application no more than one year after the judgment becomes final.

AS 08.88.470 Order of Court; grounds; defense of actions; burden of proof; presumption; dismissals; compromise of claims.

(a) Whenever the court proceeds upon an application as set forth in AS 08.88.465 it shall order payment out of the Real Estate Surety Fund only upon a determination that the aggrieved party has a valid cause of action within the purview of AS 08.88.460 and has complied with the provisions of AS 08.88.465.

If the judgment in favor of the applicant was by default, stipulation, or consent, or if the action against the licensee was defended by a trustee in bankruptcy, the applicant shall have the burden of proving that the cause of action against the licensee was for fraud, intentional misrepresentation, deceit, or conversion of trust funds. Otherwise the judgment shall create a rebuttable presumption of the fraud, intentional misrepresentation, deceit, or conversion of trust funds by the licensee, which presumption shall affect the burden of producing evidence.

The commission may move the court at any time to dismiss the application when it appears there are no triable issues and the petition is without merit. The motion may be supported by affidavit of any person or persons having knowledge of the facts, and may be made on the basis that the petition, and the judgment referred to therein, does not form the basis for a meritorious recovery claim within the purview of AS 08.88.460; provided, however, that the commission shall give written notice at least 10 days before such motion.

AS 08.88.471 Defense of actions: conclusive adjudications of issues.

NEW

(a) If the judgment is found against more than one individual licensed under AS 08.88 for performance of acts for which a license is required under that chapter, it shall be the responsibility of the commission, in the absence of proration by the court, to prorate the award charges among the said judgment debtors.

AS 08.88.472 Order directing payment out of fund: limitation of liability.

NEW

If the court finds after the hearing that the claim should be levied against the Real Estate Surety Fund, the court shall enter an order directed to the commission requiring payment from the Real Estate Surety Fund of the amount payable upon the claim pursuant to the provisions of and in accordance with the limitations contained in this chapter.

Notwithstanding any other provisions of this chapter, the liability of the Real Estate Surety Fund for the purposes of this chapter shall not exceed ten thousand dollars (\$10,000) for any one transaction for which the cause of action occurred, regardless of the number of persons injured, the number of licensees involved, or the number of parcels of real estate involved in the transaction.

NO CHANGE

Sec. 08.99.475 Maximum liability. (a) The maximum liability of the real estate surety fund does not exceed \$50,000 for any one broker or salesman.

NO CHANGE

Sec. 08.88.480. Order of claim payment. If the money deposited in the real estate surety fund is insufficient at a given time to satisfy a duly authorized claim against the fund, the commission shall, when sufficient money has been deposited in the fund and appropriated, satisfy unpaid claims in the order that the claims were originally filed, plus accumulated interest at the rate of eight percent a year. (1 ch 143 SLA 1974; am ch 167 SLA 1980; AS 45.85.070)

AS 08.88.490. Right to Subrogation.

to Substantive  
Change

When upon the order of the court, the commission has paid from the Real Estate Surety Fund any sum to the judgment creditor, the commission shall be subrogated to all of the right of the judgment creditor and the judgment creditor shall assign all his right, title and interest in the judgment to the commission. Any amount and interest recovered by the commission on the judgment shall be deposited in the Real Estate Surety Fund.

AS 08.88.495. Disciplinary action against brokers and salesmen.

Nothing contained herein shall limit the authority of the commission to take disciplinary action against any licensee for a violation of any of the provisions of AS 08.88 or the regulations promulgated by the commission. The repayment in full of all obligations to the Real Estate Surety Fund by any licensee does not nullify or modify the effect of disciplinary proceeding brought under the provisions of AS 08.88.

NO CHANGE

Sec. 08.88.500. Definition. In this chapter a commission means the Real Estate Commission established under this chapter.  
(40 ch 167 SLA 1980; AS 49.85.120)

NEW

(a) "final judgment" means a judgment not subject to further judicial review.

Observations of Julian Mason:

1. At such time as the first version of suggested changes may be enacted by the legislature, the commission as a matter of housekeeping should rescind the Surety Fund regulations which would no longer be relevant.
2. To my knowledge, no other regulatory body in the state can award damages to a third party without a jury trial. They can fine and/or assess losers to pay attorney fees.
3. Small claims court defendants can opt for district court in order to have a jury trial.

Recommended Hearing Officer Briefing and Instructions

The 1974 legislations which provided for the creation of a surety fund, starting with fees collected in the 1976 license renewal cycle, was the culmination of joint efforts of the commission and the industry to more adequately protect the public from illegal actions of licensees. Its intended purpose was two-fold:

(1) to provide indemnification up to \$10,000/transaction and \$50,000/Licensee for judgments awarded by the courts to persons who suffered financial loss because of a licensee's actions that involved fraud, deceit, misrepresentation, or conversion of trust funds, and

(2) to provide funding for real estate education of both the public and the licensees from funds collected in excess of the specified \$250,000 minimum balance in the fund.

When the 1980 amendments to the statute removed the necessity of a court judgment to access the fund, it shifted the responsibility for providing a fair and impartial hearing and a decision based on facts to our arena. It is this hearing, held in accordance with the Administrative Procedures Act, and a proposed decision with its accompanying rationale that we, the Alaska Real Estate Commission, require of you.

It is worthy of note that most states which have similar recovery funds provide some means of attempting to collect from the wrongdoer-licensee prior to considering a claim against their respective funds. Other provisions common to many states require proof of fraud, intentional misrepresentation, or intentional improper actions; most states do not support collection based on negligence, and this commission has reservations about awards based on reasons other than intentional misrepresentation.

It is the policy of this commission to stay proceedings pursuant to AS 08.88.465 (a) when a court action is pending.

When writing your findings on an assigned case, please use the following format for submitting the proposed decision to the commission.

1. Case file number
2. Identity of Claimant and Respondent
3. Summary paragraph which includes:
  - a) claimant's requested amount
  - b) respondent licensee's alleged violation, i.e. fraud, deceit, misrepresentation, or conversion of trust funds.
  - c) Dates--of the transaction, of the claim, and of the hearing
4. Any other pertinent introductory material should be in a second paragraph.
5. Findings of fact elicited in the hearing.
6. Conclusions of law with rationale and case precedent as needed.
7. Recommendation:
  - a) to pay in total
  - b) to pay in part
  - c) to deny payment
8. If more than one licensee is named as respondent and payment is recommended, specify which licensee(s) were actually guilty of the fraud, deceit, misrepresentation, or conversion of trust funds.



REALTOR<sup>®</sup>

ALASKA ASSOCIATION OF REALTORS<sup>®</sup>

1818 W. Northern Lights Blvd., Suite 104 • Anchorage, Alaska 99503  
Telephone 907-272-8018

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Attached is a summary of a problem area of vital concern to the real estate industry. The ALASKA ASSOCIATION OF REALTORS is suggesting content for a bill which will address the issue. We seek your consideration and support.

Summary

History

From its creation in 1964, as reflected in AS 08.88, the Real Estate Commission's primary purpose has been the protection of the public through the examining and licensing of real estate practitioners. Through 1975, the public's guarantee of monetary relief was a required bond in the amount of \$1000/Salesman and \$5000/broker.

Through the early '70's there were few claims against the bonds; however, the industry realized that the bonding level was not adequately protecting the public's interests. Following the example of twelve other states, (Footnote: 1974 NARELLO Report, page 2' the industry together with the Real Estate Commission actively lobbied for the 1974 legislation (Attachment A: 45.85.010-110 & 08.88.281, .071, & .401) to create a surety fund with a two-fold purpose:

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Thus from the 1976 license renewal cycle when the first fees were paid into the surety fund, judges were able to order payment directly from the fund to satisfy a judgment.

These conditions were in effect until 1980 when the statute was amended, initiated by the Legislative Audit Committee during the Sunset Review, to charge the Real Estate Commission with the responsibility to both hear cases and award payments, but without ensuring the full protection of due process and judicial precedent (Attachment B).

The use of hearing officers (as allowed by the Administrative Procedures Act) starting in January 1982 and the regulations adopted by the Commission in December 1982 (effective April 1983) have further attempted to work within the current statute (Attachment C).

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B) 1980 Amended Surety Fund Statute  
C) 1982 Surety Fund Regulations

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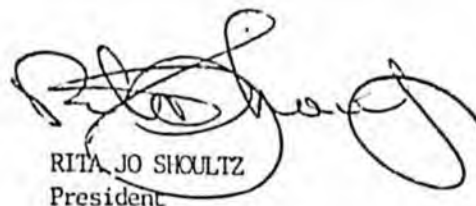
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It is the consensus of the industry that a concentrated effort must be made immediately to restore the integrity of the surety fund, both in concept and in actual administration.

Points to Achieve

1. Ensure the rights of all parties to due process through the court system with the determination of a claim's validity and resultant damage assessment in the courts.
2. Maintain the Surety Fund as a resource to be drawn upon only when funds are not collectable from the judgment debtor by any other means.
3. Charge the Real Estate Commission with the responsibility of timely license action on the licensee whose action has resulted in a draw from the Fund.
4. Direct the Real Estate Commission to provide quality education programs to licensees and the public as to licensees' responsibilities under the real estate statutes and regulations.

ALASKA ASSOCIATION OF REALTORS

  
RITA JO SHULTZ  
President

SB 537 TITLE & SPONSOR SUMMARY  
AMENDED TITLE:  
AN ACT RELATING TO THE REAL ESTATE SURETY FUND

14:37 5/22/84 PAGE 1 OF 2

PRIME SPONSOR: SENATE LABOR&COMM COMMITTEE  
CO-SPONSORS:

CURRENT STATUS: 3/28/84 IN (S) LABOR & COM REFERRAL: FINANCE

SB 537 SENATE ACTION

14:37 5/22/84 PAGE 2 OF 2

DATE SEQ PAGE

LEGISLATIVE ACTION

03/28/84 01 2503 FIRST READING -- COMMITTEE REPORTS  
LABOR & COMMERCE  
FINANCE  
RULES

XXXX XX XY XXX XXX XXX





# ALASKA STATE LEGISLATURE - SENATE

## COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASCN  
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811  
(907) 465-3844

OFFICIAL BUSINESS

TO: Senator Jalmar Kerttula

FROM: Senator Dick Eliason, Chair *[Signature]*  
Senate Labor and Commerce Committee

RE: HB 705 - An Act relating to the real estate surety fund

DATE: May 12, 1984

The above-mentioned legislation would require a claim against the real estate surety fund to be processed through the court system instead of the current procedure involving a hearing officer under the jurisdiction of the Real Estate Commission. The Alaska Association of Realtors view the passage of this legislation as the answer to their concerns regarding the number of frivolous claims filed against the surety fund as well as the length of time required to settle the disputes.

However, since the introduction of HB 705 the Alaska Supreme Court issued an opinion regarding the Alaska Real Estate Surety Fund. The Court ruled that this surety fund cannot be used for claims involving "innocent" misrepresentation. The fund can only cover payment to claims resulting from "willful" misrepresentation, fraud, or deceit on the part of the realtor. The immediate result of this decision will be to substantially reduce the number of claims filed by the public as well as the number of claims honored by payment from the surety fund. Jim Magowan, Executive Director of the Real Estate Commission, estimates that approximately half of the justifiable claims stem from innocent misrepresentation.

As a result of this Supreme Court decision, Jim estimates that the Commission will receive approximately 80-100 claims annually. These claims will be handled by a full-time hearing officer under the direction of the Commission. This new position has just recently been approved by both the Senate and the House. It is estimated that all claims should be finalized within a 3-4 month period of time.

The Supreme Court decision and the approval of the full-time hearing officer appears to have answered two main concerns expressed by the realtors. An additional disincentive to file frivolous claims would be to impose a significant filing fee to be paid by each claimant prior to processing a claim against the surety fund. If the claimant does not prevail, then the filing fee would be lost. A filing fee could be set at a \$50.00 minimum or 5% of the claim whichever is greater to a maximum of

\$250.00. Such a filing fee would most likely chill frivolous claims without unnecessarily impeding valid claims made against the fund.

Individuals who voiced opposition to HB 705 are concerned that court proceedings are time consuming and expensive. Jim Magowan has indicated that the average claim against the surety fund is \$4,000 with approximately 25% of the claims \$2,000 or less. If an individual had to turn to the court system for regress, the costs involved would be prohibitive for these relatively small claims. Unfortunately, the small claims court is not a guaranteed answer as each party involved in the suit has the right to require that the "formal rules of civil procedure" prevail which would necessitate involving the district court. This action could increase the costs and time involved in finalizing the claim. Karla Forsythe, General Counsel, Alaska Court System, estimates that a standard civil law suit in Anchorage could take a least one year to finalize.

The Alaska Real Estate Commission held a public hearing on April 24, 1984, in Anchorage. After five hours of public testimony, it was the opinion of the Commission that important issues and questions had been raised by licensees and non-licensees. However, it was felt that HB 705 did not adequately resolve the issues and further review and input was necessary to address all concerns. The Commission recognized the importance of recommending alternative legislation next session and stated that this area of need would be a high priority.

As the need for this legislation does not seem to be as great as at the time of introduction, possibly the legislature should consider postponing any action in this area until the Real Estate Commission formulates its position.

# MEMORANDUM

# State of Alaska

TO: Dick Monkman  
Assistant Attorney General  
Commercial Section, Anchorage

DATE: April 3, 1984

FILE NO:

TELEPHONE NO:

276-3550

FROM: Norman C. Gorsuch  
Attorney General

SUBJECT: House Bill 705 -  
Real Estate Surety  
Fund

By: *Karen*  
Karen M. Procter  
Paralegal Assistant  
Commercial Section-Anchorage

I attended this morning's legislative teleconference on House Bill 705 held at the Anchorage Legislative Affairs office. The purpose of the teleconference was to accept public testimony on the bill before the House Labor and Commerce Committee. The Committee was represented by Chairman Cowdery, Representatives Pestinger, Furnace, and Ringstad. Present in the Anchorage audience were Jim Magowan, Executive Director of the Real Estate Commission; Liz Johnson, a private attorney who does hearing officer work before the Commission; Frank Austin, a past public member of the Commission; and about 15 members of the real estate industry.

Testimony was offered by Liz Johnson, Frank Austin, and Dave Ribacchi in Anchorage; Jeff Cook and Linda Stromming (?) in Fairbanks; Grace Volkay in Juneau; and Hilton Marchant and Hazel Reinhardt in Soldotna. Karen Morris of Fairbanks made herself available to questions. The testimony was briefly as follows:

Liz Johnson, private attorney and state-appointed hearing officer. Johnson supported the hearing officer system over the proposed court system approach because it is most efficient, cheapest, and fastest; also, in the present system a complaint is against the fund rather than an individual. She characterized the two systems as "direct recovery vs. an entire court proceeding." A court proceeding would require that the claimant prove "innocent" or "intentional" misrepresentation, an unfair burden on the claimant, and one which would stand in the way of a fair resolution of the claim.

Frank Austin, former public member of the Alaska Real Estate Commission. Austin said there was little in the proposed bill that served the public. The Commission originally decided the court system was not serving the industry and the hearing officer system was instituted. He said the use of hearing officers has sped up the claim process dramatically. Only about one-fourth of the claims filed with the fund are paid, demonstrating that the fund does not pay frivolous claims and

2

that the present process serves the industry well. Austin commented that the public should be protected from "innocent" as well as "intentional" misrepresentation. The surety fund is part of the public domain, not the industry domain. He expressed concern that there was very little or no public notice of today's hearing.

Dave Ribacchi, a licensee and member of the Alaska Real Estate Commission. Ribacchi felt strongly that the Legislature should not move too quickly on this one p

iece of legislation when there are so many complex problems with real estate statutes and regulations that must be corrected. Ribacchi said that the Commission itself has not taken a stand on this issue because there is so much that must be considered first. He was concerned that this bill does not address questions of liability. Ribacchi stated that the Commission has initiated action to deal with these problems.

Jeff Cook, Alaska Association of Realtors, Fairbanks, and a past industry member of the Alaska Real Estate Commission. Cook said he did not approve of the hearing officer system when it was instituted, and that it has not worked. He complained that the surety fund bears all costs, i.e., the licensees pay the costs of frivolous claims. The hearing officer system does not provide for screening of claims; there are no filing fees; there is no reimbursement of costs. It is a no-risk system for the claimant. He said the inclusion in the bill of the language "intentional" did not bother him.

Linda Stromming, Greater Fairbanks Area Realtors. Stromming supports H.B. 705 because it will allow realtors due process. She claimed that hearing officers rarely have the expertise that judges have, and that licensees do not get full protection of the law under the hearing officer system.

Grace Volkay, Alaska Association of Realtors, Juneau. Volkay felt that the hearing officer system had greatly increased the number of surety fund claims, and that the time taken to process a claim is not always shorter than it would be under the court system. The proposed legislations's requirement of obtaining a judgment before pursuing assets is good because it validates the consumer's claim. Volkay said that a hearing officer is just "one person," "unchallenged," whereas a judge can hear testimony from both sides and render points of law. She said it was time to take the State out of the dual role of judge and jury. Hearing officers have held licensees responsible for "innocent" misrepresentation, and this isn't fair, she said. She urged passage of the bill as is.

Hilton Marchant, Alaska Association of Realtors, Soldotna. He felt that dropping the word "intentional" from the bill would be okay. The hearing system has some merit in terms of time frame, but otherwise it is not fair.

Hazel Reinhardt, Fairbanks realtor. Reinhardt expressed agreement with Hilton.

Following testimony, the committee voted to pass the bill. It now moves into the Senate Labor and Commerce Committee. An audio presentation of discussion between the Senate committee and Jim Magowan may be heard today at 1:30 p.m. at Legislative Affairs. There will be no audience participation in the discussion.

It is interesting to note that, in regard to Austin's concerns about public notice of this hearing, the committee members felt that the "public showing" at the teleconference demonstrated that word did get out. As you can see, though, the Anchorage audience was almost entirely composed of licensees; it is probably safe to assume the same of the other audiences.



Official Business

# Alaska State Legislature

Senate

Office of the President

Pouch V  
State Capitol  
Juneau, Alaska 99811

## MEMORANDUM

To: Senator Dick Eliason  
Chair, Senate Labor & Commerce Committee

From: Senate Jay Kerttula  
Senate President

Date: April 16, 1984

Subject: SB 537

A handwritten signature in cursive script, appearing to read "Jay".

Would you please consider moving Senate Bill 537 from Labor & Commerce to the Finance Committee at the ~~earliest~~ <sup>earliest</sup> possible? This bill relates to the real estate surety fund.

Your consideration is appreciated.

*Just increase the amounts perhaps?*

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**ALASKA ASSOCIATION OF REALTORS®**

1818 W. Northern Lights Blvd., Suite 104 • Anchorage, Alaska 99503  
Telephone 907-272-8016

TO: Members of the Alaska Legislature  
FROM: Rita Jo Shoultz, President Alaska Association of REALTORS  
DATE: April 13, 1984

The attached remarks by attorney Julian L. Mason were made during the January 20, 1984 Real Estate Commission meeting.

At that meeting the Real Estate Commission asked the Alaska Association of REALTORS to develop a "White Paper" or position paper with regard to the Real Estate Surety Fund. The Association prepared that requested white paper, distributed it personally to the commissioners and Mr. Magowan on March 4-5 and presented the paper formally to the Real Estate Commission at their meeting March 6, 1984. As a result of the White paper, legislation was introduced (HB 765 and SB 537). The transcript is being provided as background material.

Currently, it can take up to three years for claims to be heard and settled. The claims are heard by one hearing officer, making that one person the judge and jury. That officer gives his or her report to the commissioners and they make a decision based on that one opinion without the benefit of the testimony from either side.

The Alaska Association of REALTORS has always worked for regulation of the industry and protection of the public. We feel the proposed legislation will serve to promote these goals.

Enclosure: Transcript Julian Mason - Remarks of Real Estate Commission 1/20/84 mtg.



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MARK E. ASHBURN  
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DONALD W. McCLINTOCK III

DEBORAH SENW  
OF COUNSEL  
ADMITTED IN  
ILLINOIS AND WASHINGTON  
NOT ADMITTED IN ALASKA

February 27, 1984

Trish Hurley Smith  
Anchorage Board of Realtors  
1818 W. Northern Lights Blvd.  
Suite 103  
Anchorage, AK 99503

Dear Trish:

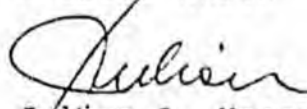
I believe that the transcript of my remarks at the Real Estate Commission hearing on January 20, with some exceptions, is accurate. However, transcriptions of extemporaneous statements lose voice inflections and oral punctuation and therefore are frequently unclear. If the remarks are to be published, I think they should be edited slightly for clarity.

I have enclosed an edited transcript which is in substance true to the original, but which corrects transcription errors and is more clear than the original.

I listened carefully to the tape and must offer my congratulations to the person who did the transcribing. I spent about two hours listening to the tape and working on the transcription and I'm the person who uttered the words. I assume that the person who did the transcription has gone crazy and fled the state.

Very truly yours,

BAILY & MASON

  
Julian L. Mason

JLM/nk

Enc.

Transcript of Julian Mason's remarks at Real Estate  
Commission Meeting, January 20, 1984

(Edited for Clarity)

Commissioner Ribacchi:

"Generally, do we have a problem with our statutes, with our regulations or with our own operating procedures or do we have a problem with all of them?"

Julian Mason:

I think there is a combination of answers to that. Let me break it down into some pieces.

The specific concern of the real estate community is that the surety fund statute in its present form is not achieving the result which was originally intended and, in fact, is achieving results which the real estate people feel are contrary to public policy. But there's a statute in place and the statute in some cases, I'm sure, has been misinterpreted and in other cases has been interpreted correctly; you can't change that by regulation.

In my judgment, there need to be statutory amendments. One possible amendment is reimposition of the requirement that a person get a judgment before the surety fund can be tapped. That's one of a number of solutions. But any change in the statutes must be made legislatively; it cannot be made by regulation. You can't pass a regulation contrary to the statutes.

There are procedures that can be changed by the Commission in two ways; one way is by regulation - make regulatory changes. I think the last regulation changes went into effect on April 10 of this year, if I remember correctly. One was mentioned earlier, the two year statute of limitations. That's a relatively time consuming process, but it has the beauty of certainty, unlike the legislative process.

The second way that procedures can be changed is by giving policy directions to the hearing officer. I'm not really prepared today to make specific suggestions to you, but I would point out that the way the statute is constructed you actually operate under two statutes. You operate under Title 8 which is the Real Estate Commission Act ~~in the statute~~ and you also operate under the Administrative Procedure Act. The Administrative Procedure Act allows you to delegate

essentially all or less than all of your authority to act, and it's that provision under which you use hearing officers to gather evidence and make or partially make decisions on your behalf. There is, incidentally, some interesting confusion about the way the Act is constructed. You probably could delegate the whole process to the hearing officer and, untouched by Commission hands, decisions would be made. You can stop far short of that and, if you believe the hearing officers are misconstruing the Act, I see no reason why you can't direct the hearing officers to construe the Act in certain ways. Now, if you do that, and if you misconstrue the Act, claimants are free to challenge your construction. I see no reason that you must allow a hearing officer repeatedly to construe the Act in ways that are contrary to your understanding of the Act.

The administrative process is an interesting one, and it's one that's widely misunderstood. If you go back only a very short time - really just 30 or 40 years - there were no administrative agencies. What you do was done, if it was done at all, by the Executive branch of government. The conclusion was reached that it's too big a task and that there should be delegation within the executive branch. So, you as members of the Real Estate Commission are charged with the responsibility for administering certain statutes and balancing a variety of interests, both those of the real estate community and those of the public at large, and you have enormous responsibility in doing that and enormous authority to act. There is absolutely no requirement whatsoever that you allow the process to continue in ways that you think are contrary to the public interest or contrary to the statutes, or contrary to your own regulations. You are required to follow the law and that includes the regulations, which properly enacted have the force and effect of law. You're certainly free to give direction to hearing officers and anyone else who is in the administrative process to construe things as you think they should be construed in the public interest - not in the interest of a particular claimant, not in the interest of the real estate community, but in a broader public interest. That's something you can do fairly quickly. If the surety fund statute is being misconstrued, you can decree here today or tomorrow, or at your next meeting that it be construed properly and tell hearing officers to operate under what you believe is the correct construction of the Act. You can change some things by regulation, although I don't think that regulatory changes are going to change the problems we talked about here today. You made some changes in the regulations; the statute of limitations was one that was very helpful. I don't think there are other regulatory changes that you need to make right now. You have to go from first delivering some

ultimatums in the hearing process and skip to the statutory changes.

Mr. Ribacchi asked a minute ago whether additional public input is required. I don't want to be presumptuous and put myself in the position of advising the Commission. I'll just put on my own personal hat and say that to me, that's an anathema. The Real Estate Commission is formulated and charged with safeguarding the public interest. You are free to consult anyone that you wish and get his or her advice and feelings about how a particular problem should be handled. It makes no sense at all to encumber yourselves by making a larger, and larger, and larger committee. In fact, in the end, you are compelled to exercise your own judgment and your own discretion. You can't rely on that of others. There is no committee that you can create to replace the Real Estate Commission. If the Real Estate Commission feels that a statutory change should be made then, in my judgment, it is free to make that recommendation to the Legislature. If the Anchorage Board or the State Association of REALTORS, feels the statutes should be changed, it is free to make that recommendation to the Legislature, just as I am or any other member of the public. We should all draw on the resources that are available to us to decide what those changes should be, but it seems to me to be ducking a responsibility to add people off of the Commission to an enlarged committee of the whole. You're perfectly free to consult them - other people - and I assume that each and every one of you will, but the responsibility for determining whether statutory changes should be made is one that you should make yourselves. I urge you to keep your committee a committee of the Real Estate Commission or smaller.

The advice that was given earlier was good advice. The gentleman said: 'If you want to change the thing, get together and decide on one course of action, and then go to Juneau; don't send people down to go in different ways.' I think the real estate community is perfectly capable of proposing statutory changes and asking the Commission to join in recommending these changes to the Legislature. That's the process to which I'm accustomed and certainly one in which I've participated with other state agencies. I do a lot of utility work as you know and frequently recommend changes in public utilities statutes but a policy which my clients have is that we don't go around asking for statutory changes without telling the affected regulatory body. I think that the real estate community should be developing proposed statutory changes by consulting with this Commission, and it should attempt to go hand in glove with this Commission to Juneau so we have a unified approach to effect changes.

Commissioner \_\_\_\_\_:

Was it statutory changes that moved awards from the surety fund away from the court?

Julian Mason:

That's correct, that was the change made in either 1979 or 1980.

Commissioner \_\_\_\_\_:

That was absolutely a statutory change, that wasn't a regulatory change?

Julian Mason:

That was a statutory change and it was one that in a sense, as one Commissioner pointed out, snuck by the real estate community and the Commission. As I recall, it was tacked in as part of the sunset legislation. It was a statutory change.

*Review - discussion / notes from all needed areas.*  
*in the context - motion*  
*Recollection of the request*  
*Paraphrasing individual as e.g. 0*  
*Reasons:*  
*Some of which have occurred*  
*in the past - not all of them*  
*desirable for industry*

To: Alaska Real Estate Commission  
From: Alaska Association of REALTORS  
Date: March 5, 1984

This is Part I of the industry response to the request from the Commission at their January 1984 meeting for recommendation of needed changes in the relevant statutes, regulations and operating procedures. It addresses only the Surety Fund, and is drafted so that pages 1-11 may be lifted for use by the Commission and Association in approaching the legislature. Pages 12 & 13 are recommended as a briefing and instruction sheet for hearing officers of surety fund claims under the existing statute and regulations.

The remainder of the real estate statute and corresponding regulations will be reviewed and subsequent parts of this white paper will detail to the Commission

- 1) the content recommendations
- 2) the rationale for the recommendations
- 3) the suggested action to accomplish, i.e. propose a statute change, amend the regulations, or adopt an operating procedure.

Attached is a summary of a problem area of vital concern to the real estate industry. The ALASKA ASSOCIATION OF REALTORS is suggesting content for a bill which will address the issue. We seek your consideration and support.

History

From its creation in 1964, as reflected in AS 08.88, the Real Estate Commission's primary purpose has been the protection of the public through the examining and licensing of real estate practitioners. Through 1975, the public's guarantee of monetary relief was a required bond in the amount of \$1000/Salesman and \$5000/broker.

Through the early '70's there were few claims against the bonds; however, the industry realized that the bonding level was not adequately protecting the public's interests. Following the example of twelve other states, (Footnote: 1974 NARELLO Report, page 25) the industry together with the Real Estate Commission actively lobbied for the 1974 legislation (Attachment A: 45.85.010-11C & 08.88.281, .071, & .401) to create a surety fund with a two-fold purpose:

1) to provide indemnification up to \$10,000/transaction for judgments awarded by the courts to persons who suffered financial loss because of a licensee's actions that involved fraud, deceit, misrepresentation, or conversion of trust funds, and

2) to provide funding for real estate education of both the public and the licensees from funds collected in excess of the specified \$250,000 minimum balance in the fund.

The 1974 legislation, which was patterned after the California model, required court action and a judgment against a licensee prior to any disbursement of Surety Fund dollars. However, Alaska's enacted version did not require an attempt to collect money from or attach the assets of the named licensee, nor did it provide for any review by the Commission prior to payment from the fund.

Thus from the 1976 license renewal cycle when the first fees were paid into the surety fund, judges were able to order payment directly from the fund to satisfy a judgment.

These conditions were in effect until 1980 when the statute was amended, initiated by the Legislative Audit Committee during the Sunset Review, to charge the Real Estate Commission with the responsibility to both hear cases and award payments but without ensuring the full protection of due process and judicial precedent (Attachment B).

The use of hearing officers (as allowed by the Administrative Procedures Act) starting in January 1982 and the regulations adopted by the Commission in December 1982 (effective April 1983) have further attempted to work within the current statute (Attachment C).

- Attachments:
- A) 1974 Surety Fund Statute
  - B) 1980 Amended Surety Fund Statute
  - C) 1982 Surety Fund Regulations

Current Situation

The real estate industry in Alaska consists of some 4000 licensees who support sensible legislation to regulate the industry and to protect the public against illegal real estate practices. This sense of professional responsibility has not changed throughout the 20-year historical summary period outlined above.

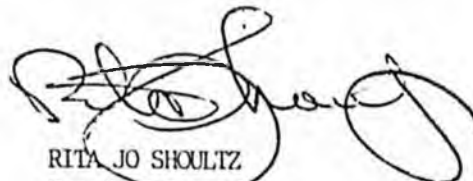
Currently there are no filing fees or costs if a claim is denied, nor is the claimant required to exhaust other remedies before receiving satisfaction from the Surety Fund. Thus, the "no-risk" and "no-costs incurred" status of claimants simply encourages claims. Further, the state entity, either contracted or appointed, is in the position of being both judge and jury.

It is the consensus of the industry that a concentrated effort must be made immediately to restore the integrity of the surety fund, both in concept and in actual administration.

Points to Achieve

1. Ensure the rights of all parties to due process through the court system with the determination of a claim's validity and resultant damage assessment in the courts.
2. Maintain the Surety Fund as a resource to be drawn upon only when funds are not collectable from the judgment debtor by any other means.
3. Charge the Real Estate Commission with the responsibility of timely license action on the licensee whose action has resulted in a draw from the Fund.
4. Direct the Real Estate Commission to provide quality education programs to licensees and the public as to licensees' responsibilities under the real estate statutes and regulations.

ALASKA ASSOCIATION OF REALTORS

  
RITA JO SHOULTZ  
President

Means to Achieve

The following is proposed to be introduced as an amendment to HB 389.

Add a Section 11: Article 5 (AS 08.88.450-500) is amended so that in its entirety it would read:

Sec. 08.88.450 Real estate surety fund. There is created a special account in the general fund known as the real estate surety fund to carry out the purposes of this chapter. The fund shall be composed of payments made by licensed real estate brokers and salesmen under AS 08.88.455. The fund may not exceed \$500,000 and amounts in the fund in excess of \$250,000 may be appropriated for real estate educational purposes as provided in AS 08.88.091. (1 ch 148 SLA 1974, am 34 ch 167 SLA 1980; AS 45.85.010)

NO CHANGE

AS 08.88.455 Payments by real estate brokers and salesmen.

(a) A licensed real estate broker, associate broker, of salesman when obtaining or renewing a real estate license, in lieu of obtaining a corporate surety bond, shall pay to the commission in addition to the license fee, a Surety Fund fee not to exceed \$125. After the fund reaches \$250,000, the commission shall by regulation adjust the bond fees so that, taking into account anticipated expenditures for claims against the fund and real estate educational purposes, the fund is maintained at a level not less than \$250,000.

Already in CSHB389 for equalization of fee structure.

NO CHANGE

(b) All fees collected under this section shall be paid at least once a month by the commission into the general fund. These payments shall be credited to the real estate surety fund. (1 ch 143 SLA 1974; am 35 ch 167 SLA 1980; AS 45.85.020)

AS 08.88.460 Claim for payment.

NEW

(a) When any aggrieved person obtains a final judgment in any court of competent jurisdiction against any person or persons licensed under AS 08.88, under grounds of fraud, deceit, intentional misrepresentation or conversion of trust funds, arising directly out of any transaction when the judgment debtor was licensed and performed acts for which a licensee is required under AS 08.88, the aggrieved person may, upon the judgment becoming final, file a verified application in the court in which the judgment was entered for an order directing payment out of the Real Estate Surety Fund of the amount of actual and direct loss in the transaction up to the sum of ten thousand dollars (\$10,000) of the amount unpaid upon the judgment.

In the case of a small claims court judgment, the aggrieved person shall file the verified application in the district court in which the judgment was entered in favor of the aggrieved person. The court shall then make a determination as to whether the small claims court judgment was based on facts constituting grounds for recovery under this section and may enter an order directing payment of the small claims court judgment out of the Real Estate Surety Fund.

A copy of the verified application shall be served upon the commission and the judgment debtor and a certificate or affidavit of that service filed with the court.

(b) Nothing in this section shall be interpreted to authorize payment from the Real Estate Surety Fund for transactions or events which solely involves innocent misrepresentation on the part of a real estate licensee.

(c) Application for payment from the fund shall be made within one year from the date that the judgment becomes final.

AS 08.88.465 Time for action by court on application for payment: required showing of person aggrieved.

NEW  
(a) The court shall conduct a hearing upon such application 30 days after service of the application upon the commission. Upon petition by the commission and showing of good cause, the court may continue the hearing for such further period as it deems appropriate. At the hearing, the aggrieved person shall be required to show that:

(1) he is not a spouse of the debtor, or the personal representative of such spouse.

(2) he has complied with all requirements of this article.

(3) he has obtained a judgment as set out in AS 08.88.460, stating the amount thereof and the amount owing thereon at the date of the application.

(4) he has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets, liable to be sold or applied in satisfaction of the judgment.

(5) he has discovered no personal or real property or other assets liable to be sold or applied, or that he has discovered certain of them owned by the judgment debtor and liable to be so applied, and that he has taken all necessary action and proceedings for the realization thereof, and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment.

(6) he has diligently pursued his remedies against all the judgment debtors and all other persons liable to him in the transaction for which he seeks recovery from the Real Estate Surety Fund.

(7) he is making said application no more than one year after the judgment becomes final.

AS 08.88.470 Order of Court; grounds; defense of actions; burden of proof; presumption; dismissals; compromise of claims.

(a) Whenever the court proceeds upon an application as set forth in AS 08.88.465 it shall order payment out of the Real Estate Surety Fund only upon a determination that the aggrieved party has a valid cause of action within the purview of AS 08.88.460 and has complied with the provisions of AS 08.88.465.

If the judgment in favor of the applicant was by default, stipulation, or consent, or if the action against the licensee was defended by a trustee in bankruptcy, the applicant shall have the burden of proving that the cause of action against the licensee was for fraud, intentional misrepresentation, deceit, or conversion of trust funds. Otherwise the judgment shall create a rebuttable presumption of the fraud, intentional misrepresentation, deceit, or conversion of trust funds by the licensee, which presumption shall affect the burden of producing evidence.

The commission may move the court at any time to dismiss the application when it appears there are no triable issues and the petition is without merit. The motion may be supported by affidavit of any person or persons having knowledge of the facts, and may be made on the basis that the petition, and the judgment referred to therein, does not form the basis for a meritorious recovery claim within the purview of AS 08.88.460; provided, however, that the commission shall give written notice at least 10 days before such motion.

AS 08.89.471 Defense of actions: conclusive adjudications of issues.

NEW

(a) If the judgment is found against more than one individual licensed under AS 08.88 for performance of acts for which a license is required under that chapter, it shall be the responsibility of the commission, in the absence of proration by the court, to prorate the award charges among the said judgment debtors.

AS 08.88.472 Order directing payment out of fund: limitation of liability.

NEW

If the court finds after the hearing that the claim should be levied against the Real Estate Surety Fund, the court shall enter an order directed to the commission requiring payment from the Real Estate Surety Fund of the amount payable upon the claim pursuant to the provisions of and in accordance with the limitations contained in this chapter.

Notwithstanding any other provisions of this chapter, the liability of the Real Estate Surety Fund for the purposes of this chapter shall not exceed ten thousand dollars (\$10,000) for any one transaction for which the cause of action occurred, regardless of the number of persons injured, the number of licensees involved, or the number of parcels of real estate involved in the transaction.

NO CHANGE

Sec. 08.99.475 Maximum liability. (a) The maximum liability of the real estate surety fund does not exceed \$50,000 for any one broker or salesman.

NO CHANGE

Sec. 08.88.480. Order of claim payment. If the money deposited in the real estate surety fund is insufficient at a given time to satisfy a duly authorized claim against the fund, the commission shall, when sufficient money has been deposited in the fund and appropriated, satisfy unpaid claims in the order that the claims were originally filed, plus accumulated interest at the rate of eight percent a year. (1 ch 143 SLA 1974; am ch 167 SLA 1980; AS 45.85.070)

AS 08.88.490. Right to Subrogation.

No Substantive  
Change

When upon the order of the court, the commission has paid from the Real Estate Surety Fund any sum to the judgment creditor, the commission shall be subrogated to all of the right of the judgment creditor and the judgment creditor shall assign all his right, title and interest in the judgment to the commission. Any amount and interest recovered by the commission on the judgment shall be deposited in the Real Estate Surety Fund.

AS 08.88.495. Disciplinary action against brokers and salesmen.

Nothing contained herein shall limit the authority of the commission to take disciplinary action against any licensee for a violation of any of the provisions of AS 08.88 or the regulations promulgated by the commission. The repayment in full of all obligations to the Real Estate Surety Fund by any licensee does not nullify or modify the effect of disciplinary proceeding brought under the provisions of AS 08.88.

NO CHANGE

Sec. 08.88.500. Definition. In this chapter a commission means the Real Estate Commission established under this chapter. (40 ch 167 SLA 1980; AS 45.85.120)

NEW

(a) "final judgment" means a judgment not subject to further judicial review.

Observations of Julian Mason:

1. At such time as the first version of suggested changes may be enacted by the legislature, the commission as a matter of housekeeping should rescind the Surety Fund regulations which would no longer be relevant.
2. To my knowledge, no other regulatory body in the state can award damages to a third party without a jury trial. They can fine and/or assess losers to pay attorney fees.
3. Small claims court defendants can opt for district court in order to have a jury trial.

Recommended Hearing Officer Briefing and Instructions

The 1974 legislations which provided for the creation of a surety fund, starting with fees collected in the 1976 license renewal cycle, was the culmination of joint efforts of the commission and the industry to more adequately protect the public from illegal actions of licensees. Its intended purpose was two-fold:

(1) to provide indemnification up to \$10,000/transaction and \$50,000/Licensee for judgments awarded by the courts to persons who suffered financial loss because of a licensee's actions that involved fraud, deceit, misrepresentation, or conversion of trust funds, and

(2) to provide funding for real estate education of both the public and the licensees from funds collected in excess of the specified \$250,000 minimum balance in the fund.

When the 1980 amendments to the statute removed the necessity of a court judgment to access the fund, it shifted the responsibility for providing a fair and impartial hearing and a decision based on facts to our arena. It is this hearing, held in accordance with the Administrative Procedures Act, and a proposed decision with its accompanying rationale that we, the Alaska Real Estate Commission, require of you.

It is worthy of note that most states which have similar recovery funds provide some means of attempting to collect from the wrongdoer-licensee prior to considering a claim against their respective funds. Other provisions common to many states require proof of fraud, intentional misrepresentation, or intentional improper actions; most states do not support collection based on negligence, and this commission has reservations about awards based on reasons other than intentional misrepresentation.

It is the policy of this commission to stay proceedings pursuant to AS 08.88.465 (a) when a court action is pending.

When writing your findings in an assigned case, please use the following format for submitting the proposed decision to the commission.

1. Case file number
2. Identity of Claimant and Respondent
3. Summary paragraph which includes:
  - a) claimant's requested amount
  - b) respondent licensee's alleged violation, i.e. fraud, deceit, misrepresentation, or conversion of trust funds.
  - c) Dates--of the transaction, of the claim, and of the hearing
4. Any other pertinent introductory material should be in a second paragraph.
5. Findings of fact elicited in the hearing.
6. Conclusions of law with rationale and case precedent as needed.
7. Recommendation:
  - a) to pay in total
  - b) to pay in part
  - c) to deny payment
8. If more than one licensee is named as respondent and payment is recommended, specify which licensee(s) were actually guilty of the fraud, deceit, misrepresentation, or conversion of trust funds.

THE PRECEDING DOCUMENT(S) MAY NOT FILM  
LEGIBLY BECAUSE OF POOR QUALITY OF THE  
ORIGINAL.



## LAWS OF ALASKA

1974

Source

SOS OSIB 248 (Judiciary)

Chapter No.

143

## AN ACT

Establishing a real estate surety fund; and providing for an effective date.

## BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS 45 is amended by adding a new chapter to read:

## CHAPTER 85. REAL ESTATE SURETY FUND.

Sec. 45.85.010. REAL ESTATE SURETY FUND. There is created a special account in the general fund known as the real estate surety fund to carry out the purposes of this chapter. The fund shall be composed of payments made by licensed real estate brokers and salesmen under sec. 20 of this chapter. The fund may not exceed \$300,000, and amounts in the fund in excess of \$250,000 may be appropriated for real estate educational purposes as provided in AS 08.69.091.

Sec. 45.85.020. PAYMENTS BY REAL ESTATE BROKERS AND SALESMEN. (a) A licensed real estate broker or associate broker, when obtaining or renewing his real estate license, in lieu of obtaining a corporate surety bond, shall pay to the commissioner of commerce in addition to the license fee, a bond fee not to exceed \$125, and a licensed salesman, when obtaining or renewing his license, in lieu of obtaining a corporate surety bond, shall pay to the commissioner in addition to the license fee, a bond fee not to exceed \$40. After the fund reaches \$250,000 the commissioner shall by regulation adjust the bond fees so that, taking into account anticipated expenditures for claims against the fund and real estate educational purposes, the fund is maintained at a level not less than \$250,000.

(b) All fees collected under this section shall be paid at least once a month by the commissioner into the

general fund. These payments shall be credited to the real estate surety fund.

Sec. 45.85.030. APPLICATION FOR PAYMENT. (a) When a person obtains a final judgment in a court against a real estate broker or salesman licensed under AS 08.69 on grounds of fraud, misrepresentation, deceit or conversion of trust funds arising directly out of a transaction when the judgment debtor was licensed and performed acts for which a license is required under AS 08.69, the person may file a verified application in the court in which the judgment was entered for an order directing payment out of the real estate surety fund of the amount of actual direct damages, plus costs of obtaining judgment, up to the sum of \$10,000 of the amount unpaid upon the judgment and costs. However, not more than \$10,000 may be paid for each transaction regardless of the number of persons injured or the number of parcels of real estate involved in the transaction. A copy of the verified application shall be served upon the commissioner and a certificate or affidavit of service filed with the court.

(b) Applications for payment from the fund shall be made to the commissioner within one year from the date that the judgment becomes final.

Sec. 45.85.040. PAYMENT. (a) If judgment has not been paid within 30 days after its entry, the court shall order payment out of the real estate surety fund.

(b) The commissioner may, subject to court approval, compromise a claim based upon the application and judgment. He is not bound by a prior compromise or stipulation of the judgment debtor.

Sec. 45.85.050. COURT ORDER. If the court finds after the hearing that the claim should be levied against the fund allocated for the purpose of carrying out the provisions of this chapter, it shall enter an order directed to the commissioner requiring payment from the real estate surety fund of the sum it finds to be payable on the claim in accordance with this chapter.

Sec. 45.85.060. MAXIMUM LIABILITY. (a) The maximum liability of the real estate surety fund does not exceed \$50,000 for any one broker or salesman.

(b) If the \$50,000 liability of the fund as provided in (a) of this section is insufficient to pay in full the valid claims of all persons who have filed claims against one broker or salesman, the \$50,000 shall be distributed among the claimants in the ratio that their individual claims bear to the aggregate of valid claims, or in another manner that the court considers equitable. Distribution shall be among the persons entitled to share in the recovery, without regard to the order of priority in which their judgments were obtained or their claims filed.

Sec. 45.85.070. ORDER OF CLAIM PAYMENT. If the money deposited in the real estate surety fund is insufficient at a given time to satisfy a duly authorized claim against the fund, the commissioner shall, when sufficient money has been

permitted in the fund and appropriations, satisfy credits in the fund that the claims were originally filed, plus accumulated interest at the rate of eight percent a year.

Sec. 45.85.080. FALSE CLAIMS OR DOCUMENTS. A person who files with the commissioner a notice, statement or other document required under this chapter which contains a willful material misstatement of fact, is guilty of a misdemeanor and is punishable by imprisonment for a period of not more than one year, or a fine of not more than \$1,000, or by both.

Sec. 45.85.090. RIGHT TO SUBROGATION. When the commissioner has paid to a judgment creditor from the real estate fund the sum ordered by the court, the commissioner shall be subrogated to all of the rights of the judgment creditor to the amount paid and the judgment creditor shall assign all of his rights, title and interest in that portion of the judgment to the commissioner. Amounts subsequently realized by the commissioner on the judgment shall be deposited to the fund.

Sec. 45.85.100. PURCHASE OF BOND. Until the amount in the fund reaches \$750,000, the commissioner shall purchase for the fund a bond in an amount sufficient to provide for liability of the fund up to a total of \$250,000.

Sec. 45.85.110. DISCIPLINARY ACTION AGAINST BROKERS AND SALESMEN. This chapter neither limits the authority of the Real Estate Commission to take disciplinary action against any person licensed under AS 45.85, nor does payment in full of all obligations to the real estate surety fund nullify or modify the effect of disciplinary proceedings brought under the provisions of AS 45.85.

• Sec. 2. AS 08.33.021 is repealed and re-enacted to read:

Sec. 08.33.021. REAL ESTATE SURETY FUND. Before issuing a license to an applicant under this chapter, the board shall determine that the applicant has complied with the provisions of AS 45.85.020 and is covered by the real estate surety fund established in AS 45.85.

• Sec. 3. AS 08.33.071 is amended by adding a new subsection to read:

(b) When a payment is made from the real estate surety fund under AS 45.85 in settlement of a claim or toward satisfaction of a judgment against a licensed broker, associate broker or salesman for fraud, misrepresentation, deceit or conversion of trust funds, the commission, after a proper hearing establishing the misconduct, shall suspend or revoke the license of the broker, associate broker or salesman. The broker, associate broker or salesman may not be reinstated until he has satisfied in full any judgment based on any of the grounds listed in sec. 32 of this chapter.

• Sec. 4. AS 05.39.001(c) is amended to read:

(c) No person may

(1) knowingly authorize, direct, or aid in the publication of a false statement or misrepresentation concerning land or a subdivision or other real estate offered for sale or lease;

(2) with knowledge that an advertisement, pamphlet, or letter concerning land or a subdivision or other real estate contains a written statement that is false or fraudulent, issue, circulate, publish, or distribute it or cause it to be issued, circulated, published, or distributed.

• Sec. 5. This Act takes effect January 1, 1976.

ARTICLE 6.  
SURETY FUND CLAIMS

Section	
280.	Procedures
285.	Claims
290.	Notification of claim
295.	Deadlines
300.	Current address of claimants
305.	Hearings
310.	Role of interested licensee
315.	Withdrawal of claim
320.	Motion for reconsideration
325.	Findings and conclusions
330.	Waiver of provisions

12 AAC 64.280. PROCEDURES. 12 AAC 64.280 - 12 AAC 64.330 govern the proceedings for hearings relating to real estate surety fund claim matters under AS 08.88.450 - 08.88.500 (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.285. CLAIMS. Claims for reimbursement from the real estate surety fund must

(1) be submitted on a form provided by the commission;

(2) be for a loss suffered in a real estate transaction by the claimant as a result of fraud, misrepresentation, deceit, or the conversion of trust funds by a licensed real estate broker, associate broker or salesman;

(3) include all the information required by AS 08.88.460(a) and by the claim form itself; and

(4) be executed under penalty of perjury. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.290. NOTIFICATION OF CLAIM. (a) Upon receipt of a claim filed according to the provisions of AS 08.88.460(a), the commission will mail a copy of the claim, all documentary material filed with the claim, and a response form to the interested licensees by certified mail, return receipt requested. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.295. DEADLINES. For a claim to be considered valid for the purposes of reimbursement from the surety fund, the claimant must file a claim in accordance with AS 08.88.460 within one year after the date the alleged loss was discovered or could have been discovered, but in any event, not later than two years after the transaction is recorded or the transfer of interest date. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.300. CURRENT ADDRESS OF CLAIMANTS. It is the responsibility of each claimant to keep his or her current mailing address and telephone number on file with the commission until the claim is resolved. Failure to maintain a current mailing address and telephone number with the commission while a

claim is pending may result in dismissal of the claim. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.305. HEARINGS. (a) In accordance with the provisions of AS 44.62.350, the commission will delegate a claim filed against the surety fund to a hearing officer. In an order of delegation the commission will specify whether the hearing officer will hear the claim case alone or whether the commission will hear the claim case with the hearing officer.

(b) Hearings will be conducted according to the procedures set out in AS 44.62.330 - 44.62.630 except that

(1) the copy of a claim mailed to an interested licensee under 12 AAC 64.290 and AS 08.88.460(b) is substituted for an accusatory statement under AS 44.62.360 or a statement of issues under AS 44.62.370;

(2) the written statement in opposition to a claim or application for presentation of additional evidence under 12 AAC 64.310(c) and AS 08.88.465(c) is substituted for a notice of defense under AS 44.62.390; and

(3) AS 08.88.450 - 08.88.500 and 12 AAC 64.280 - 12 AAC 64.330 control over AS 44.62.330 - 44.62.630, in the case of any conflicts or inconsistencies. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.310. ROLE OF INTERESTED LICENSEE. (a) At the time the commission sends notice of a claim to an interested licensee under 12 AAC 64.290, the interested licensee for all legal purposes, a named party in proceedings held by the commission regarding the claim.

(b) If the individual named in a claim filed against the surety fund is a real estate associate broker or a real estate salesman, the real estate broker responsible for supervising the activities of the associate broker or salesman at the time of the alleged occurrence will also be sent notice of the claim according to the provisions of 12 AAC 64.290, and, for all legal purposes also a named party in any proceedings held by the commission regarding the claim.

JULY 1983

PROFESSIONAL AND  
VOCATIONAL REGULATIONS

12 AAC 64.310  
12 AAC 64.950

Interested licensee shall have 10 days  
receipt of notice of a claim to respond in  
writing. Filing of the response in the U.S. mails  
with a return receipt requested, shall  
constitute a timely response.

(d) If an interested licensee fails to respond in  
writing to notification of a claim within 10 days  
after receipt of the notification, as permitted by  
AS 08.88.455(c), the commission will, in its  
discretion, proceed with disposition of the  
claim. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.315. WITHDRAWAL OF CLAIM.

(a) A claimant may withdraw a claim filed under  
AS 08.88.440 at any time before the proposed  
decision is filed with the commission.

(b) Withdrawal of a claim by the claimant does  
not preclude disciplinary proceedings by the  
commission against the interested licensee un-  
der the provisions of AS 08.88 (Eff. 4/10/83,  
Reg. 86)

Authority: AS 08.88.081

12 AAC 64.320. MOTION FOR RECON-  
SIDERATION. A motion for reconsideration

of a decision concerning a contested claim must  
be filed in accordance with AS 44.62.540 (Eff.  
4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.325. FINDINGS AND CONCLU-  
SIONS. (a) After disposition of a claim, the com-

mission shall make in writing its findings and  
conclusions in accordance with the provisions  
of AS 08.88.470.

(b) The commission must furnish a copy of its  
findings and conclusions to

(1) the claimant;

(2) the claimant's legal representative, if  
applicable;

(3) the interested licensee, and

(4) the interested licensee's legal representa-  
tive, if the licensee is a corporation or partnership, if applicable. (Eff.

4/10/83, Reg. 86)

Authority: AS 08.88.081

12 AAC 64.330. WAIVER OF PROVISIONS.

The commission will, in its discretion, waive  
a provision of 12 AAC 64.250 - 12 AAC  
64.330 if it determines that the public interest  
and the satisfaction of the purpose of the provi-  
sion are reasonably assured and that the require-  
ments of AS 08.88.450 - 08.88.500 are satis-  
fied. (Eff. 4/10/83, Reg. 86)

Authority: AS 08.88.081



105 ADAK, FAIRBANKS, ALASKA 99701  
Area Code (907) 452-5186

Plus 32 identical  
letters

March 31, 1984

Senator Eliason  
Pouch V  
Juneau, Alaska 99811

Dear Senator Eliason:

I am writing to express my approval of House Bill 705 and Senate Bill 537 regarding the Real Estate Surety Fund.

I feel that these bills would provide for a more equitable use of this fund than the system presently in effect.

For further comments, I can be reached at 452-5186.

Sincerely,

REALTY INCORPORATED

*Ernie*  
Ernie Carter  
Sales Associate

ECC/kw

*Hi!*

*Best wishes to you - haven't seen you since we had a few Olyp when you first went to Juneau - I was a city Councilman from Fairbanks trying to see that we got our share of the pie!*

5/16/84

To: Dick / From: Sheila

Re: Additional info on surety fund from  
Tim Magowan

1) # of claims filed against the surety fund  
and not yet settled - 157 claims

2) total \$ amount asked for by these  
claims - \$901,657

3) total \$ amount currently in the surety  
fund - over \$600,000

4) Past history shows 30% claims are  
awarded with 25% dollars awarded.  
(More smaller claims are awarded, therefore  
the difference in %) THEREFORE the fund is  
solvent!!

5) Currently there are approximately 4,200  
licenses in the state as compared  
to approximately 2,500 two years ago.  
With the increase # of realtors, the  
# of claims should increase. The  
increase of claims does not necessarily  
mean that frivolous claims are being  
filed.

6) The Commission estimates each claim is processed for \$400-600. ~~\$~~

5/11/84

To: Dick / From: Sheila

Re: Surety Fund for realtors

I talked to Jim Magowan, Ex Dir. of the Real Estate Csmn & he provided the following information:

The recent Supreme Court ruling states that innocent misrepresentations are not covered by the surety fund. Willful misrepresentation, fraud, & deceit are covered by this fund. Currently 30% of the claims filed ~~will~~ receive payment, i.e. the csmn decides in favor of the claimant.

With this new court decision, it is estimated that 80-100 claims a yr will be received by the csmn. A full time hearing officer has been budgeted for & Jim is looking to a period of 3-4 mths to finalize claims

The average claim is for \$4,000 with approximately 25% of the claims under

\$2,000. A problem with a claimant going to small claims involves the realtors right to "check the box" which indicates the desire to go "to court" instead. This action would certainly discourage the claimant from proceeding further action

It was Jim's opinion that when attorney fees are awarded it is only 15-40% of the actual cost involved. So the consumer would have to fit the bill.

### Jim's Suggestions

1) Set a filing fee of a minimum of ~~\$50~~<sup>\$50</sup> or 5% of claim which ever is greater to a maximum of \$250. This fee would be returned if the claimant wins.

2) Allow the csmn to establish a "summary dismissal procedure" so that obvious unfounded cases could be dismissed.

3) Explore possibility of a full-time

hearing officer with a volunteer  
3 member jury panel. This system would  
relieve the concern of the realators  
as far as being heard by only one  
individual.

# Real Estate/Classified E

Anchorage Daily News Saturday, February 11, 1984

## Claims on real estate surety fund increase

by JIM ERICKSON  
Daily News business reporter

An increasing number of claims are being filed against a special state fund to reimburse homebuyers who were bilked by their real estate agent.

But Alaska Real Estate Commission officials say the increase is not because agents in general are shady or incompetent.

"We are experiencing an increase in claims and complaints, but we're also experiencing increases in number of real estate licensees," said James Magowan, executive director

of the regulatory and licensing body.

There are between 3,500 and 4,000 licensees in the state, roughly double the number here in 1980.

Last year 123 claims were filed against the \$500,000 surety fund, which lawmakers established in 1980 to reimburse consumers who could prove they were cheated in real estate transactions.

In 1982, 93 claims were filed. There have been 18 filed through January of this year.

On a per-license basis, the numbers aren't terribly bad, especially

in light of the record number of home sales in the last two years, Magowan said. More sales increase the likelihood of mistakes, he said.

Of claims filed in the last year, 14 were approved and \$67,644 was paid to homebuyers who made their case. In 1982, 18 claims totaling \$62,612 were approved.

In all, 286 claims have been filed since 1981 asking for \$1.3 million total. Roughly one claim in 10 is withdrawn. And about half of the claims haven't been settled yet, Magowan said.

About 30 percent of all complain-

ants eventually win a settlement.

The increasing number of claims filed also is due to "greater public awareness that the surety fund is there and real estate commission is there," said Commissioner Dave Ribacchi, a marketing specialist with Century 21/Heritage Homes.

Some real estate agents are concerned the fund can function as an unguarded treasure trove, a source of cash for homebuyers who may not have legitimate complaints. Some argue the fund could be used as a vehicle for harassment.

"That's one side of the coin,"

Magowan said.

"The other side of the coin is when somebody out there is bad the fund is there so people can readily file a claim," instead of taking the matter to a lawyer.

"When there are bad actors in the business, we find out about them real quick," Magowan said.

An advantage of the surety fund is it can help brokers and client get together outside of the system and work out differences.

"This fund has had an amazing influence in affecting the way things get settled."