

4/29

COMMITTEE REPORT HOUSE

(7)

FURTHER FINANCE

3/15/85

Date: _____

The Committee on JUDICIARY has had HB 232
"An Act relating to claims against the real estate surety fund."

under consideration and recommends:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for HB 232 (Jud) same title
 new title
- and recommends it do pass
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation Zero Fiscal Note Attached
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:
DO PASS IF
RECORDED

Taylor [Signature] Sund

Gruenberg [Signature]

Pettyjohn [Signature]

Phillips [Signature]

M.M. Miller [Signature]

[Signature]

[Signature]
CHAIRMAN

COMMITTEE REPORT
HOUSE

3/15
JUDICIARY

(7)

FURTHER: FINANCE

2/25/85

Date: _____

Mr. Speaker:

The Committee on LABOR & COMMERCE has had HB 232

"An Act relating to claims against the real estate surety fund."

under consideration and reports it back as follows:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note *Sup 30*
 Zero Fiscal Note Attached
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

DAVIS *Mike Davis*
KOPONEN *Mike Koponen*

HATLEY *Clare Hatley - No Rec*
PEARCE *Joe Pearce - No Rec*
BECCHER *Cliff Becher Mr Paul*
Mike Davis
NAVARET *Mike Navaret - No Rec*

Mike Navaret
CHAIRMAN

Offered: 4/29/85
Referred: Finance

Cromer

Original sponsor: Clocksin

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 232 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to real estate claims based on
7 innocent misrepresentation; and claims against the
8 real estate surety fund."

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

10 * Section 1. AS 08.88 is amended by adding a new section to read:

11 Sec. 08.88.395. INNOCENT MISREPRESENTATION. A person licensed
12 under this chapter is not liable to another person for innocent mis-
13 representations of fact.

14 * Sec. 2. AS 08.88.460(a) is amended to read:

15 (a) A person seeking reimbursement for a loss suffered in a
16 transaction as a result of fraud, negligent or intentional misrepre-
17 sentation, deceit, or the conversion of trust funds on the part of a
18 real estate broker, associate real estate broker, or real estate
19 salesman licensed under this chapter shall make a claim to the commis-
20 sion for reimbursement on a form furnished by the commission. The
21 form shall be executed under penalty of perjury, and information
22 required to be supplied shall include the following:

23 (1) the name and address of the real estate broker, associ-
24 ate real estate broker, or real estate salesman;

25 (2) the amount of the alleged loss;

26 (3) the date or period of time during which the alleged
27 loss occurred;

28 (4) the date upon which the alleged loss was discovered;

29 (5) the name and address of the claimant; or

1 (6) the general statement of facts relative to the claim-
2 ant.

3 * Sec. 3. AS 08.38.460(d) is amended to read:

4 (d) A claimant under this section shall pay a filing fee of \$25
5 [\$250] to the commission at the time the claim is filed. The filing
6 fee shall be refunded only if

7 (1) the commission makes an award to the claimant from the
8 real estate surety fund; or

9 (2) [THE CLAIM IS DISMISSED UNDER (c) OF THIS SECTION; OR

10 (3)] the claim is withdrawn by the claimant before the
11 commission holds a hearing on the claim.

12 * Sec. 4. AS 08.88.465(d) is amended to read:

13 (d) The claimant bears the burden of proof of establishing that
14 the claimant suffered losses in a transaction as a result of fraud,
15 negligent or intentional misrepresentation, deceit, or the conversion
16 of trust funds on the part of a real estate broker, associate real
17 estate broker, or real estate salesman and the extent of those losses.
18 All facts shall be established by a preponderance of the evidence.

19 * Sec. 5. AS 08.88.474 is amended to read:

20 Sec. 08.88.474. PAYMENT OF [SMALL CLAIMS] JUDGMENT. If a
21 [CLAIM ORIGINALLY FILED WITH THE COMMISSION IS DISMISSED AND IS HEARD
22 AS A SMALL CLAIMS ACTION UNDER AS 08.88.460(c) AND THE] claimant
23 prevails in a court [THE SMALL CLAIMS] action against a [THE] real
24 estate broker, associate real estate broker, or salesman, and the
25 action was based on conduct substantially similar to that set out in
26 AS 08.88.460(a), the commission shall make an award from the fund of
27 any outstanding portion of the [SMALL CLAIMS] judgment. The commis-
28 sion shall make the award after [ON] receipt of a copy of the final
29 judgment and an affidavit from the claimant stating that more than 30

1 days have elapsed since the judgment became final and that the broker,
2 associate broker, or salesman has not satisfied the judgment during
3 that time. After payment of a [SMALL CLAIMS] judgment the commission
4 is subrogated to the claimant's rights in the judgment under AS 08.-
5 88.490.

6 * Sec. 6. Section 1 of this Act applies to causes of action arising on
7 or after the effective date of this Act.

8 * Sec. 7. Sections 2 - 5 of this Act do not apply to a claim that a
9 real estate broker, associate real estate broker, or real estate salesman
10 has elected to remove to small claims court under AS 08.88.460(c) before
11 the effective date of this Act.

12 * Sec. 8. The commission shall refund \$225 of the filing fee paid under
13 AS 08.88.460(d) to a claimant whose case is pending on the effective date
14 of this Act.

15 * Sec. 9. AS 08.88.460(c) and 08.88.465(f) are repealed.
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Introduced: 2/25/85
Referred: Labor & Commerce,
Judiciary and Finance

crone
0543

1 IN THE HOUSE

BY CLOCKSIN

2 HOUSE BILL NO. 232

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to claims against the real estate
7 surety fund."

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

9 * Section 1. AS 08.88.460(a) is amended to read:

10 (a) A person seeking reimbursement for a loss suffered in a
11 transaction as a result of fraud, innocent, negligent or intentional
12 misrepresentation, deceit, or the conversion of trust funds on the
13 part of a real estate broker, associate real estate broker, or real
14 estate salesman licensed under this chapter shall make a claim to the
15 commission for reimbursement on a form furnished by the commission.
16 The form shall be executed under penalty of perjury, and information
17 required to be supplied shall include the following:

- 18 (1) the name and address of the real estate broker,
19 associate real estate broker, or real estate salesman;
- 20 (2) the amount of the alleged loss;
- 21 (3) the date or period of time during which the alleged
22 loss occurred;
- 23 (4) the date upon which the alleged loss was discovered;
- 24 (5) the name and address of the claimant; or
- 25 (6) the general statement of facts relative to the
26 claimant.

27 * Sec. 2. AS 08.88.460(d) is amended to read:

28 (d) A claimant under this section shall pay a filing fee of \$25
29 [\$250] to the commission at the time the claim is filed. The filing

HB 232

1 fee shall be refunded only if

2 (1) the commission makes an award to the claimant from the
3 real estate surety fund; or

4 (2) [THE CLAIM IS DISMISSED UNDER (c) OF THIS SECTION; OR

5 (3)] the claim is withdrawn by the claimant before the
6 commission holds a hearing on the claim.

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11 conversion of trust funds on the part of a real estate broker,
12 associate real estate broker, or real estate salesman and the extent
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14 the evidence.

15 * Sec. 4. AS 08.88.474 is amended to read:

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17 [CLAIM ORIGINALLY FILED WITH THE COMMISSION IS DISMISSED AND IS HEARD
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19 prevails in a court [THE SMALL CLAIMS] action against a [THE] real
20 estate broker, associate real estate broker, or salesman, and the
21 action was based on conduct substantially similar to that set out in
22 AS 08.88.460(a), the commission shall make an award from the fund of
23 any outstanding portion of the [SMALL CLAIMS] judgment. The
24 commission shall make the award after [ON] receipt of a copy of the
25 final judgment and an affidavit from the claimant stating that more
26 than 30 days have elapsed since the judgment became final and that the
27 broker, associate broker, or salesman has not satisfied the judgment
28 during that time. After payment of a [SMALL CLAIMS] judgment the
29 commission is subrogated to the claimant's rights in the judgment

1 under AS 08.88.490.

2 * Sec. 5. This Act does not apply to a claim that a real estate broker,
3 associate real estate broker, or real estate salesman has elected to remove
4 to small claims court under AS 08.88.460(c) before the effective date of
5 this Act.

6 * Sec. 6. The commission shall refund \$225 of the filing fee paid under
7 AS 08.88.460(d) to a claimant whose case is pending on the effective date
8 of this Act.

9 * Sec. 7. AS 08.88.460(c) and 08.88.465(f) are repealed.
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STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Handwritten: 5/1/85

Page 1 of 4

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 232
 Title: An Act relating to claims
against the real estate surety fund
 Sponsor: Clocksie
 Requestor: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Commerce & Economic Dev.
 Program Category Affected: Consumer Protection
 BRU, Program or Subprogram(s) Affected: Real Estate Commission

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		77.0	80.0	85.0	125.0	131.0
200 TRAVEL		8.0	10.0	12.0	18.0	20.0
300 CONTRACTUAL		15.0	16.0	18.0	25.0	29.0
400 SUPPLIES		3.0	3.5	4.0	5.0	5.5
500 EQUIPMENT		12.0	.5	1.5	3.5	.5
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS		250.0	300.0	300.0	375.0	425.0
800 MISCELLANEOUS						
TOTAL OPERATING		365.0	410.0	419.0	551.5	611.0
CAPITAL		0	0	0	0	0
REVENUE		5.0	6.9	8.5	10.0	11.9

FUNDING: (Thousands of Dollars)

GENERAL FUND		115.0	110.0	119.0	176.5	186.0
FEDERAL FUNDS		0	0	0	0	0
OTHER		250.0	300.0	300.0	375.0	425.0
TOTAL		365	410.0	419.0	551.5	611.0

POSITIONS:

FULL-TIME		2	2	2	2	2
PART-TIME		0	0	0	1	0
TEMPORARY		0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

Prepared By: James I. Magowan Phone: 563-2169
 Division: Real Estate Commission Date: 03/04/85
 Approved by Commissioner: James Magowan Date: 3/14/85
 Agency: Alaska Real Estate Commission

Distribution (by Agency preparing fiscal note):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

7/1/84

The two main effects of this bill are:

1. To eliminate the filing fee as a deterrent to the filing of a surety claim regardless of the merits of the claim.
2. To broaden the grounds for payment of a surety claim to include losses due to innocent and negligent acts by a licensee.

Prior to the May 1984 Loken-Johnson v. AREC decision, there was no filing fee and claims for innocent and negligent misrepresentation were being paid. Prior to October 1984, there was no filing fee and the commission was receiving about 200 claims per year and that number was probably on the increase. Of the claims received, about 30% were being awarded, 70% were being denied.

Since October 2, 1984, the commission has received six claims, one of which was submitted with an NSF check for the filing fee. None of these has been heard yet, due to the backlog created when 200 claims per year were being filed, therefore there is no data on the percentage paid, however, it is expected to be very high.

The decrease in the filing fee would probably result in 150-200 or more additional claims per year being filed. It would be better to evaluate filing fees for public injury claims in general and make them all the same rather than the current system with no uniformity or conceptual basis for fees.

The change in grounds for payment would result in an additional 20-50% of these being eligible for payment. This would add up to between 40 and 100 consumers per year recovering an estimated average of \$2,500 - 3,000 for innocent/negligent misrepresentations. Most of these could probably recover, even now, through a small claims action. The commission would have to hold three additional hearings for every additional claim paid for innocent/misrepresentation.

The commission would require additional clerical staff (two full-time positions) as well as the potential of an additional full time hearing examiner to carry out the above.

The high rate of dismissed claims in the past stems, in part, from the public not evaluating its cases before filing them. Why expend the effort when the State will do it?

The interaction between grounds for payment of a claim and the fee for filing a fee has generated some confusion.

The amount of the fee helps determine the degree of scrutiny a claimant will engage in prior to filing a claim. This translates into the ratio of claims paid to claims denied. The ideal fee should discourage all invalid claims but no valid claims.

If the willingness and ability of the consumer to file a claim is to be virtually unchecked by the fee there should be one or more additional checks and balances incorporated into the process.

1. If the fee is reduced to \$25.00, there should be provision for initial administrative review and dismissal of claims with no discernable merit. Currently, all claims must be granted a hearing. Without the review it could add thousands of dollars of cost with little or no added public benefit.
2. There should be a provision for the claimant to be charged back the cost of a hearing in which the claim is found to be fraudulently filed.

If innocent or negligent misrepresentations are included as grounds for payment of a claim the provision of automatic suspension of a license without further hearing should be modified. and not applicable in cases of innocent misrepresentation. There is great concern by licensees that their licenses might be jeopardized by innocent errors. This is definitely an area that needs to be safeguarded against.

As the Supreme Court pointed out in its decision, the impact of *Bevins v. Ballard* on the surety fund if it is to pay on innocent misrepresentations could be enormous. The nature of Alaska soils, climate and building conditions makes it very difficult to know and predict everything that can happen to a property. For this reason, innocent misrepresentations may occur at a higher rate than in other parts of the country.

This bill gives the licensee great exposure for damages resulting from acts by others, acts of which the licensee has no knowledge and over which, no control. This, in effect, makes the licensee the preferred "target" when a contractor or other seller is at fault. The surety fund provides protection when a seller is gone and the fund is the only place to turn. The inexpensive access to the fund, however, also makes it the preferred action to take even when the "guilty" party is available and not a licensee. Making it easier to "go after" a licensee for an innocent act than it is to go after, say, a contractor who knowingly created the problem is manifestly unfair to the licensees.

0730E

COMMITTEE COPY

ALASKA STATE LEGISLATURE

14th. . . Legislature FIRST. . . Session

HOUSE . . . BILL NO. . . 232 . . .

By . . . CLOCKSIN

"An Act relating to claims against the real estate surety fund."

Real Estate Surety fund

Introduced in the House . . . 2/25 . . . , 19.85.

HISTORY IN THE HOUSE

19 85	Read first time and referred to Committee on L&C, JUDICIARY AND FINANCE												
Feb, 25	Reported back with recommendation that												
	Read second time and												
	Read third time and												
	<table border="0"> <tr><td>PASS</td><td>Effective Date</td></tr> <tr><td>Yeas</td><td>Yeas</td></tr> <tr><td>Nays</td><td>Nays</td></tr> <tr><td>Absent</td><td>Absent</td></tr> <tr><td>Excused</td><td>Excused</td></tr> </table>	PASS	Effective Date	Yeas	Yeas	Nays	Nays	Absent	Absent	Excused	Excused		
PASS	Effective Date												
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Absent	Absent												
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Reconsideration													
PASS	Effective Date												
Yeas	Yeas												
Nays	Nays												
Absent	Absent												
Excused	Excused												
	Reported correctly engrossed Signed by Speaker Sent to Senate												

CHIEF CLERK OF THE HOUSE

HISTORY IN THE SENATE

19	Read first time and referred to Committee on												
	Reported back with recommendation that												
	Read second time and												
	Read third time and												
	<table border="0"> <tr><td>PASS</td><td>Effective Date</td></tr> <tr><td>Yeas</td><td>Yeas</td></tr> <tr><td>Nays</td><td>Nays</td></tr> <tr><td>Absent</td><td>Absent</td></tr> <tr><td>Excused</td><td>Excused</td></tr> </table>	PASS	Effective Date	Yeas	Yeas	Nays	Nays	Absent	Absent	Excused	Excused		
PASS	Effective Date												
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Reconsideration													
PASS	Effective Date												
Yeas	Yeas												
Nays	Nays												
Absent	Absent												
Excused	Excused												
	Reported correctly engrossed Signed by President Returned to House												

SECRETARY OF THE SENATE

HISTORY IN THE HOUSE

19	Received from Senate
	Concurred in Senate amendment thus adopting: VOTE
	Failed to concur in Senate amendment; asked Senate to recede VOTE
	Senate receded from amendment VOTE
	Senate failed to recede from amendment VOTE
	CC appointed by House
	CC appointed by Senate
	CC adopted by House VOTE
	CC adopted by Senate VOTE
	To enrolling Reported correctly enrolled Sent to Governor by Governor
	Filed with Lt. Governor
	Chapter No.

COMMITTEE COPY

**STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE**

Revision Date: _____

REQUEST

Bill/Resolution No. CS HB 232 (JWD)
 Title: An Act relating to claims against
 the real estate surety fund
 Sponsor: Clocks in
 Requester: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Commerce & Econ. Dev.
 BRU: Real Estate Commission
 Components: Consumer Protection

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES	23.0	25.0	27.0	27.0	29.0	29.0
TRAVEL	10.0	10.0	10.0	10.0	10.0	10.0
CONTRACTUAL	10.0	10.0	10.0	10.0	10.0	10.0
SUPPLIES	1.0	1.0	1.0	1.0	1.0	1.0
EQUIPMENT	6.0	0.0	0.0	0.0	2.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	250.0	250.0	250.0	250.0	250.0	250.0
TOTAL OPERATING	300.0	296.0	298.0	298.0	302.0	300.0

CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
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REVENUE	5.0	5.0	5.0	5.0	5.0	5.0
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FUNDING: (Thousands of dollars)

GENERAL FUND	50.0	46.0	48.0	48.0	52.0	50.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	250.0	250.0	250.0	250.0	250.0	250.0
TOTAL	300.0	296.0	298.0	298.0	302.0	300.0

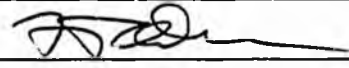
POSITIONS:

FULL-TIME	1	1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary.

Prepared by: James L. Magowan
 Division: Real Estate Commission

Phone: 563-2169
 Date: February 25, 1986

Approved by Commissioner: 
 Agency: Commerce and Economic Development

Date: February 25, 1986

Distribution (by Agency preparing fiscal note):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 232

ANALYSIS

The two effects of this bill as amended last April are:

1. It largely eliminates the deterrent effect of the filing fee to the filing of a claim. This increases the number of claims filed that have no merit. It may also increase slightly (one or two per year) the number of claims with merit that are filed.
2. It broadens the grounds upon which a claim can be paid to include negligent misrepresentations by licensees.

It is estimated that the number of claims filed would increase from 34 in 1985 to 234 per year. Of the additional 200 claims filed, an estimated 50 would be paid (estimated average amount \$5,000). This would result in approximately \$250,000 additional being paid from the fund. This would require increasing the surety payments to the maximum permitted by the statute (\$125) and eliminating most or all of the educational program funded by surety payments.

Our experience with 1985 claims is not yet complete enough to give firm data due to the fact that many of the claims are awaiting court decisions. In spite of this, there is a strong indication that over 50 percent of the claims will be paid. There is also evidence indicating that the denial and withdrawal rate will be between 24 and 40 percent. These figures support the position that the filing fee is deterring mostly nonpayable claims and also that it is not discouraging all but the most obviously payable claims.

Our experience indicates that the additional claims might be within the capability of the current hearing examiners to handle because many of them would be more simple than the ones now being filed. This would only be possible with adequate clerical support. The hearing examiners have registered complaints about the lack of clerical support currently available (see resignation letter and hearing decision in regard to George Barth from examiner Gazaway).

The revised fiscal note reflects our experience during the past year with hearings and staff examiners. The staff examiners have greatly reduced the time and cost of hearings but have exacerbated the critical need for clerical support if the commission is to handle the current, let alone an increased, workload.

Position Title Clerk Typist III			No. of Positions 1	Range/Step 8	Barg. Unit GU	Gov.	Approv.	Disapp.
Time Status PFT	Staff Months 12	RP Number	Location EBA		Election District	Leg.		
Type of Expenditure			Justification					
		Amount	<p>This position will be necessary to do the work associated with 200 additional surety claims and the hearings that they will generate. This includes maintaining data files on the cases, typing decisions and when there are appeals, transcripts. It additionally includes sending out certified notices to licensees involved in the claims (400 to 600) and sending out prehearing and hearing notices. The paperwork generated by claims is great and it must be done properly in order to comply with the due process provisions of the statutes. The current clerical staff cannot absorb additional work (the 1985 LBA report states that the current staff needs immediate assistance of an additional position) therefore without the position, it would not be possible to properly process additional claims.</p>					
1	2	3						
Salary	19.6							
Benefits	3.4							
Premium Pay								
Other								
Total Personal Services		23.0						
Travel		10.0						
Contractual		10.0						
Commodities		1.0						
Equipment		6.0						
Other								
Total Cost		50.0						
Receipt Code	Funding Source							
	Federal Receipts 1002							
	G. F. Match 1003							
	General Funds 1004		50.0					
	I-A Receipts 1005							
	Program Receipts 1028							
	CIP Receipts 1061							
	Other							
For B&M Use Only Key Number _____								

**Request For
New Position**

Agency Commerce and Economic Development
 BRU Real Estate Commission
 Component _____

Page 3 of 3
 Revised Date _____

FY 87

Article 3. Miscellaneous Provisions.

Section

263. License by endorsement

Sec. 08.88.263. License by endorsement. A person who holds a valid active real estate license issued by another state shall be granted an equivalent Alaska real estate license if that person

(1) passes the portion of the real estate examination which examines on Alaska law; and

(2) meets the requirements of AS 08.88.171. (§ 25 ch 167 SLA 1980; am § 34 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment deleted "and 08.88.211" at the end of paragraph (2).

Sec. 08.88.361. When commission is earned.

NOTES TO DECISIONS

Quoted in *Hazell v. Richards*, Sup. Ct. Op. No. 2627 (File No. 6683), 659 P.2d 575 (1983).

Article 5. Real Estate Surety Fund.

Section

450. Real estate surety fund

455. Payments by real estate brokers and salesmen

Section

460. Claim for payment

465. Consideration of application

474. Payment of small claims judgment

Sec. 08.88.450. Real estate surety fund. The real estate surety fund is established in the general fund to carry out the purposes of AS 08.88.450 — 08.88.500. The fund is composed of payments made by licensed real estate brokers and salesmen under AS 08.88.455 and filing fees retained in accordance with AS 08.88.460. 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 143 SLA 1974; am § 34 ch 167 SLA 1980; am § 2 ch 150 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "The real estate surety fund is established in the general fund" for "There is created a special account in the general fund known as the

real estate surety fund" in the first sentence and "is" for "shall be" in the second sentence and added "and filing fees retained in accordance with AS 08.88.460" at the end of the second sentence.

Sec. 08.88.455. Payments by real estate brokers and salesmen. (a) A licensed real estate broker, associate broker, or 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 surety fund 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 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; am § 3 ch 150 SLA 1984)

Effect of amendments. — The 1984 amendment, in subsection (a), substituted "associate broker, or salesman" for "or associate broker" in the first sentence and "surety fund" for "bond" in the first and second sentences and deleted "and a li-

censed salesman, when obtaining or renewing a license, in lieu of obtaining a corporate surety bond, shall pay to the commission in addition to the license fee, a bond fee not to exceed \$40" at the end of the first sentence.

Sec. 08.88.460. Claim for payment. (a) A person seeking reimbursement for a loss suffered in a transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds on the part of a real estate broker, associate real estate broker, or real estate salesman licensed under this chapter shall make a claim to the commission for reimbursement on a form furnished by the commission. The form shall be executed under penalty of perjury, and information required to be supplied shall include the following:

- (1) the name and address of the real estate broker, associate real estate broker, or real estate salesman;
- (2) the amount of the alleged loss;
- (3) the date or period of time during which the alleged loss occurred;
- (4) the date upon which the alleged loss was discovered;
- (5) the name and address of the claimant; or
- (6) the general statement of facts relative to the claimant.

(b) A copy of a claim filed with the commission under (a) of this section shall be sent to the real estate broker, associate real estate broker, or real estate salesman alleged to have committed the misconduct resulting in losses, as well as a real estate broker employing an associate real estate broker or real estate salesman alleged to have committed the conduct resulting in losses, at least 20 days before any hearing held on the claim by the commission.

(c) Within seven days after receipt of notice of a claim under (b) of this section the real estate broker, associate real estate broker, or real

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estate salesman against whom the claim is made may elect to defend the claim as a small claims action in district court under District Court Civil Rules 8 — 22, if the claim does not exceed the small claims jurisdictional limit. An election to defend a claim in district court under the small claims rules may not be revoked by the broker, associate broker, or salesman without the consent of the claimant. Upon receipt of a valid written election under this subsection the commission shall dismiss the claim filed with the commission and notify the claimant that the claim must be brought as a small claims action in the appropriate state court.

(d) A claimant under this section shall pay a filing fee of \$250 to the commission at the time the claim is filed. The filing fee shall be refunded only if

(1) the commission makes an award to the claimant from the real estate surety fund;

(2) the claim is dismissed under (c) of this section; or

(3) the claim is withdrawn by the claimant before the commission holds a hearing on the claim. (§ 36 ch 167 SLA 1980; am § 4 ch 150 SLA 1984)

Effect of amendments. — The 1984 amendment added subsections (c) and (d).

NOTES TO DECISIONS

Innocent misrepresentation not within section. — Innocent misrepresentations are not within the ambit of the term "misrepresentation" as that term is

used in this section. *State v. Johnston*, Sup. Ct. Op. No. 2825 (File No. 7826), P.2d (1984).

Sec. 08.88.465. Consideration of application. (a) Upon receipt of a claim for reimbursement, the commission may, in considering whether a claim should be granted,

(1) take and hear evidence pertaining to the claim;

(2) administer oaths and affirmations;

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the claim;

(4) engage the services of an investigator, accountant, or other expert necessary to process the claim.

(b) A certified or authenticated copy of a record, including a transcript of testimony, of a hearing held under AS 08.88.071(a)(3) in which fraud, misrepresentation, deceit, or conversion of funds on the part of a licensed broker, associate broker, or real estate salesman is established may constitute sufficient evidence to support a finding.

(c) Before the commission finds that payment should be made from the real estate surety fund, the real estate broker, associate broker, or

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real estate salesman shall be afforded an opportunity to file with the commission, within 10 days after receipt of notification of the claim under AS 08.88.460(b), either a written statement in opposition to the claim or an application for the presentation of additional evidence.

(d) The claimant bears the burden of proof of establishing that the claimant suffered losses in a transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds on the part of a real estate broker, associate real estate broker, or real estate salesman and the extent of those losses. All facts shall be established by a preponderance of the evidence.

(e) The commission may postpone consideration of a claim until after a hearing under AS 08.88.071(a)(3) or until after a pending or contemplated court proceeding is completed.

(f) The provisions of this section do not apply to a claim that is dismissed under AS 08.88.460(c). (§ 36 ch 167 SLA 1980; am § 5 ch 150 SLA 1984)

Effect of amendments. — The 1984 amendment added subsection (f).

Sec. 08.88.474. Payment of small claims judgment. If a claim originally filed with the commission is dismissed and is heard as a small claims action under AS 08.88.460(c) and the claimant prevails in the small claims action against the real estate broker, associate real estate broker, or salesman, the commission shall make an award from the fund of any outstanding portion of the small claims judgment on receipt of a copy of the final judgment and an affidavit from the claimant stating that more than 30 days have elapsed since the judgment became final and that the broker, associate broker, or salesman has not satisfied the judgment during that time. After payment of a small claims judgment the commission is subrogated to the claimant's rights in the judgment under AS 08.88.490. (§ 6 ch 150 SLA 1984)

Chapter 92. Concert Promoters.

- Section
- 10. Registration required
 - 20. Fees

HB705: passed in 1984

AN ACT

Relating to the real estate surety fund.

* Section 1. AS 08.88.071(b) is repealed and reenacted to read:

(b) When an award is made from the real estate surety fund under this chapter in reimbursement of losses suffered by a claimant as a result of fraud, misrepresentation, deceit, or conversion of trust funds on the part of a licensed broker, associate broker, or salesman, the commission may consider the hearing on the claim to be a hearing on the suspension of the license of the broker, associate broker, or salesman, and may suspend the license of the broker, associate broker, or salesman. A suspension ordered under this subsection shall be lifted if the commission and the broker, associate broker, or salesman reach an agreement with the commission on terms and conditions for the repayment to the real estate surety fund of the money awarded to the claimant and the costs of hearing the claim under AS 08.88.465. The suspension shall be reimposed if the broker, associate broker, or salesman violates the terms of a repayment agreement entered into under this subsection.

* Sec. 2. AS 08.88.450 is amended to read:

Sec. 08.88.450. REAL ESTATE SURETY FUND. The real estate surety fund is established [THERE IS CREATED A SPECIAL ACCOUNT] in the general fund [KNOWN AS THE REAL ESTATE SURETY FUND] to carry out the purposes of AS 08.88.450 - 08.88.500. The fund is [SHALL BE] composed of payments made by licensed real estate brokers and salesmen under

Chapter 150

1 AS 08.88.455 and filing fees retained in accordance with AS 08.88.411
2 The fund may not exceed \$500,000 and amounts in the fund in excess of
3 \$750,000 may be appropriated for real estate educational purposes as
4 provided in AS 08.88.091.

5 * Sec. 3. AS 08.88.455(a) is amended to read:

6 (a) A licensed real estate broker, [OR] associate broker, or
7 salesman when obtaining or renewing a real estate license, in lieu of
8 obtaining a corporate surety bond, shall pay to the commission in
9 addition to the license fee, a surety fund [BOND] fee not to exceed
10 \$125 [, AND A LICENSED SALESMAN, WHEN OBTAINING OR RENEWING A LICENSE
11 IN LIEU OF OBTAINING A CORPORATE SURETY BOND, SHALL PAY TO THE COMMISSION
12 IN ADDITION TO THE LICENSE FEE, A BOND FEE NOT TO EXCEED \$125].
13 After the fund reaches \$250,000 the commission shall by regulation
14 adjust the surety fund [BOND] fees so that, taking into account anticipated
15 expenditures for claims against the fund and real estate
16 educational purposes, the fund is maintained at a level not less than
17 \$250,000.

18 * Sec. 4. AS 08.88.460 is amended by adding new subsections to read:

19 (c) Within seven days after receipt of notice of a claim under
20 (b) of this section the real estate broker, associate real estate
21 broker, or real estate salesman against whom the claim is made may
22 elect to defend the claim as a small claims action in district court
23 under District Court Civil Rules 8 - 22, if the claim does not exceed
24 the small claims jurisdictional limit. An election to defend a claim
25 in district court under the small claims rules may not be revoked by
26 the broker, associate broker, or salesman without the consent of the
27 claimant. Upon receipt of a valid written election under this subsection
28 the commission shall dismiss the claim filed with the commission
29 and notify the claimant that the claim must be brought as a small

claims action in the appropriate state court.

(d) A claimant under this section shall pay a filing fee to the commission at the time the claim is filed. The fee shall be refunded only if

(1) the commission makes an award to the claimant from the real estate surety fund;

(2) the claim is dismissed under (c) of this section;

(3) the claim is withdrawn by the claimant and the commission holds a hearing on the claim.

* Sec. 5. AS 08.88.465 is amended by adding a new subsection:

(f) The provisions of this section do not apply to a claim that is dismissed under AS 08.88.460(c).

* Sec. 6. AS 08.88 is amended by adding a new section to read:

Sec. 08.88.474. PAYMENT OF SMALL CLAIMS JUDGMENT.
If a small claims action originally filed with the commission is dismissed and is subsequently filed as a small claims action under AS 08.88.460(c) and the claimant elects to defend the small claims action against the real estate broker, associate broker, or salesman, the commission shall make no further payment from the fund of any outstanding portion of the small claims action until the claimant receives receipt of a copy of the final judgment and an affidavit from the claimant stating that more than 30 days have elapsed since the judgment became final and that the broker, associate broker, or salesman has not satisfied the judgment during that time. After payment of a small claims judgment the commission is subrogated to the rights in the judgment under AS 08.88.490.

the other elements of a fraudulent misrepresentation claim have been demonstrated.

One additional aspect of Bubbel's misrepresentation claim requires discussion: Bubbel contends that Wien misrepresented its legal capacity to hire him as a permanent employee.¹⁰ Specifically, Bubbel argues that because Wien had the benefit of house counsel and outside attorneys, Wien knew that it had a unilateral right under the Railway Labor Act, and under federal cases, to renege on its promised "permanency" of employment. Bubbel reasons that in so far as Wien did not apprise him of that limitation on his permanent status, Wien misrepresented the permanency of his position.

Bubbel's argument on this theory is a narrow one: he does not dispute that when it hired him, Wien had the legal capacity to hire permanent replacement employees.¹¹ Bubbel concedes that Wien was not legally obliged to accept the settlement agreement proposed by the Presidential Emergency Board. Wien could have rejected the proposed settlement, defied the strikers, and continued to operate with its replacement pilots. Instead, Wien voluntarily chose to accept the settlement and furlough its replacement employees. This branch of Bubbel's misrepresentation theory, then, turns solely on Wien's failure to inform its "per-

10. For example, Bubbel argues that

There can be little doubt that if Wien had explained to Bubbel at the time of his employment hire that the employment was "permanent," but that Wien had the unilateral right at any time to settle the strike with ALPA; that the terms of the settlement may very well affect Bubbel's continued employment—Bubbel would not have believed the employment was "permanent." ... Wien had an obligation to advise and inform Mr. Bubbel that he was not a "permanent" employee....

11. Following an economic strike "the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally." *Belknap v. Hale*, — U.S. —, 103 S.Ct. 3172, 3174, 77 L.Ed.2d 798, 803 (1983).

In contrast, an employer hiring replacement employees during an unfair labor practice strike governed by the NLR Act may lack the legal capacity to offer permanent employment to such re-

placement employees that Wien could voluntarily settle the strike and thus use the collective bargaining agreement reached to override inconsistent individual employment contracts.

This court has not previously considered the question of whether a claim for relief may arise from a misrepresentation of law. Traditionally, courts have refused to recognize such representations as tortious, basing their conclusion upon the principle that "ignorance of the law is no excuse."¹² However, several recent decisions have held that this rule should be relaxed in appropriate circumstances, as for example, when

the person making the misrepresentation "has superior means of information, professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant and has not been in a situation to become informed."

Ford Motor Credit Co. v. Milburn, 615 P.2d 892, 895 (10th Cir.1980), quoting *White v. Harrigan*, 77 Okl. 123, 186 P. 221, syl. 1 (1919). Accord, *White v. Mulvania*, 575 S.W.2d 184, 192 (Mo.1978) (en banc); *Nesbitt v. Home Federal Savings & Loan Ass'n*, 440 P.2d 738, 743 (Okla.1968); see also *National Conversion Corp. v. Cedar Building Corp.*, 23 N.Y.2d 621, 298 N.Y.S.2d 499, 246 N.E.2d 351 (1969).

placements. *Id.*, — U.S. —, 103 S.Ct. 3172, 3174, 77 L.Ed.2d 798, 803; *NLRB v. International Van Lines*, 409 U.S. 48, 93 S.Ct. 74, 34 L.Ed.2d 201 (1972). In such circumstances, the employer's representation of its capacity to hire permanent replacements might well be false and thus actionable.

12. See, e.g., *Hanning v. Murphy*, 83 Ill.App.3d 1130, 39 Ill.Dec. 435, 404 N.E.2d 1026 (1980), where the court refused to impose liability for misrepresentation upon a defendant-vendor of real estate who affirmatively assured a plaintiff purchaser that a contemplated use of the property was permitted under the existing zoning ordinance. The *Hanning* court reasoned that [g]enerally, one is not entitled to rely upon a representation of law as both parties are presumed to be equally capable of knowing and interpreting the law.... We conclude plaintiff was charged with knowledge of the permitted uses of this property under applicable zoning ordinances.... 404 N.E.2d 1026 at 1030.

Recognizing the importance of the question, and the limited treatment it received in the briefing of this case, we decline to adopt a flat rule that misrepresentations of law are not actionable in this state. Instead, we hold, on the basis of this record, only that Wien did not misrepresent its hiring capacity.

[10,11] Central to our decision on this point is the character of the alleged misrepresentation. Wien did not tell Bubbel anything false, it merely failed to inform him of the legal consequences of something which might happen (i.e.: that Wien could possibly settle the ALPA strike).¹³ There is no evidence in the record suggesting that Wien anticipated such a settlement with the striking pilots at the time it hired Bubbel. On the contrary, the record reflects Wien's intention to keep the replacement pilots in their jobs even after the strike ended. Moreover, as the holding in *Belknap* reflects, Wien's right to voluntarily breach its individual employment contracts was not absolute: the subsequent collective bargaining agreement does not relieve Wien of liability for breach of inconsistent individual contracts. In such circumstances, the appropriate remedy for Wien's breach of its commitment to keep the replacements is a suit for breach of contract, rather than for misrepresentation of Wien's capacity to enter into such contracts.¹⁴

Thus, we affirm the superior court's grant of a directed verdict against Bubbel on his misrepresentation claims.

For the reasons set forth above, the judgment of the superior court is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

13. If a failure to warn a party of the possibility of a voluntary breach constitutes an actionable misrepresentation, then all contracts would involve misrepresentations.

14. We recognize that the Supreme Court's opinion in *Belknap v. Hale*, *supra*, contains language suggesting that an action for misrepresentation might be appropriate in factual circumstances similar to those before this court. However, the Supreme Court in *Belknap* held only that feder-

STATE of Alaska, REAL ESTATE COMMISSION, Appellant.

v.

Myrna JOHNSTON and Evelyn Loken, Appellees.

No. 7826.

Supreme Court of Alaska

May 4, 1984.

Purchasers of real estate who rescinded earnest money agreement claim with Real Estate Commission reimbursement of earnest money from Estate Surety Fund, alleging that defendant had misrepresented boundaries of plot. The hearing officer concluded that defendant's misrepresentation was innocent, but Estate Fund provided recovery for such misrepresentations and recommended that Fund reimburse purchasers' deposit. Commission adopted decision and awarded amount, and brokers appealed. The superior court, Third Judicial District, Judge Milton Souter, J., reversed award. Commission appealed. The Supreme Court held that Real Estate Surety Fund does not provide reimbursement to claimants for innocent misrepresentations made by brokers of real estate profession.

Affirmed.

I. Brokers ⇐4

Real Estate Surety Fund does not provide reimbursement to claimants for

al labor law does not preclude "other actionable" misrepresentation suits. — U.S. —, 103 S.Ct. 3172 at 3178, 77 L.Ed.2d 808. The Court recognized that state law determines whether an action for misrepresentation will lie in any particular case. *Id.* We conclude that our decision on Bubbel's misrepresentation claim is consistent with the holding in *Belknap*.

cent misrepresentations made by members of real estate profession. AS 08.88.460-08.88.500, 08.88.460.

2. Appeal and Error §812(8)

Applicable standard of review of superior court's decision construing statute is one of independent judgment.

3. Statutes §193

If legislative intent or general meaning of statute is not clear, meaning of doubtful words may be determined by reference to their association with other associated words and phrases.

4. Brokers §1

"Misrepresentation" as employed in statute allowing recovery from Real Estate Surety Fund for losses suffered as result of fraud, misrepresentation, deceit, or conversion of trust funds on part of real estate broker does not include innocent misrepresentation. AS 08.88.460(a, b).

See publication Words and Phrases for other judicial constructions and definitions.

Richard D. Monkman, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, for appellants.

W. Richard Fossey, Bankston & McCollum, Anchorage, and Peggy Alayne Roston, Anchorage, for appellees.

Lewis Gordon, Bailly & Mason, Anchorage, for Alaska Ass'n of Realtors, amicus curiae.

Before BURKE, C.J., and RABINOWITZ, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

This appeal presents a first impression question as to the scope and applicability of Alaska's Real Estate Surety Fund.¹ The issue raised is one of statutory construction, namely, whether the Real Estate Surety Fund provides recovery to claimants who, in the context of real estate transac-

tions, suffer losses due to innocent misrepresentations made by real estate brokers or agents.

I. FACTS

Newly arrived in Alaska the Mulhollands sought to purchase a home and contacted Eva Loken, a sales person with Area Realtors. In August of 1981, Loken showed the Mulhollands Larry Gross' home located near Eagle River. The following day the Mulhollands made an offer on the house to which the owner counter-offered. On August 10, 1981, the parties entered into an earnest money agreement and the Mulhollands tendered one thousand dollars in earnest money to Loken.

Subsequent to the initial earnest money agreement the Mulhollands contemplated rescinding on the purchase agreement and signing an earnest money agreement on another home; they were distraught over what they perceived as apparent misrepresentations made by Loken concerning mid-winter sunlight and driveway accessibility. Eventually, after discussions with Loken and Myrna Johnston, an associate broker with Area Realtors, the Mulhollands decided to go through with the deal and they signed an extension to the earnest money agreement.

On October 11, 1981, the Mulhollands were asked to accept an "as-built" survey of the property; however, because the survey failed to depict the driveway the Mulhollands refused to sign or accept the survey. Johnston ordered an updated survey. The updated survey revealed that the driveway encroached upon neighboring land to the extent of ten feet by thirty feet.

Having contacted the seller, Larry Gross, to discuss alternative solutions to the encroachment problem, Johnston informed Loken, who in turn contacted the Mulhollands. During the phone conversation between Loken and the Mulhollands a meeting was arranged for October 23, 1981—the day the earnest money agreement expired.

At the October 23rd meeting between the Mulhollands and Johnston, the Mulhollands terminated the transaction and signed a rescission agreement which provided that the earnest money would be returned. Johnston, however, on the advice of Area Realtors' attorney, never executed the rescission agreement; the Area Realtors' attorney felt that the encroachment was a curable defect which did not render title to the property unmarketable.

In December 1981, the Mulhollands filed a claim with the Real Estate Commission for the reimbursement of their earnest money deposit. Thereafter, a Real Estate Commission hearing examiner conducted a hearing on the Mulhollands' reimbursement claim. The hearing examiner concluded that Loken and Johnston had innocently misrepresented the boundaries of the Gross property. The misrepresentation of fact, according to the hearing officer's finding, "consisted of the implied assertion that the driveway was included in the boundaries of the Gross property." Concluding that the Real Estate Surety Fund provided recovery for innocent misrepresentations of this nature the hearing officer recommended that the Fund reimburse the Mulhollands' earnest money deposit.

The Real Estate Commission adopted the recommended decision and awarded the Mulhollands the equivalent of their earnest money deposit. The Commission's decision was then appealed to the superior court.

2. The full text of AS 08.88.460(a) and (b) reads as follows:

(a) A person seeking reimbursement for a loss suffered in a transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds on the part of a real estate broker, associate real estate broker, or real estate salesman licensed under this chapter shall make a claim to the commission for reimbursement on a form furnished by the commission. The form shall be executed under penalty of perjury, and information required to be supplied shall include the following:

- (1) the name and address of the real estate broker, associate real estate broker, or real estate salesman;
- (2) the amount of the alleged loss;
- (3) the date or period of time during which the alleged loss occurred;

The superior court reversed the award holding that the Surety Fund did not provide recovery for innocent misrepresentation. The State of Alaska Real Estate Commission now brings this appeal.

II. THE REAL ESTATE SURETY FUND DOES NOT PROVIDE REIMBURSEMENT TO CLAIMANTS FOR INNOCENT MISREPRESENTATION MADE BY MEMBERS OF THE REAL ESTATE PROFESSION.

[1] As indicated at the outset, the principal issue presented in this appeal is whether the Real Estate Surety Fund is obligated to reimburse claimants for innocent misrepresentations made by members of the real estate profession. In relevant part AS 08.88.460(a) provides as follows:

Claim for payment. (a) A person seeking reimbursement for a loss suffered in a transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds on the part of a real estate broker ... shall make a claim to the commission for reimbursement....²

The superior court concluded that "misrepresentation" as used in AS 08.88.460 was intended to encompass only intentional wrongdoing, not innocent or negligent wrongdoing. More particularly the superior court reasoned as follows:

I think the term misconduct as used in Section (b) of the statute implies in-

(4) the date upon which the alleged loss was discovered;

(5) the name and address of the claimant or [sic?]

(6) the general statement of facts relating to the claimant.

(b) A copy of a claim filed with the commission under (a) of this section shall be sent to the real estate broker, associate real estate broker, or real estate salesman alleged to have committed the misconduct resulting in loss, as well as a real estate broker employing an associate real estate broker or real estate salesman alleged to have committed the misconduct resulting in losses, at least 20 days before any hearing held on the claim by the commission.

1. AS 08.88.450-500.

linal-type wrongdoing, not negligent or innocent wrongdoing. And I think the statute's use of the phrase fraud, deceit, misrepresentation or conversion, particularly with the term misrepresentation coming sandwiched between fraud and deceit and coming as it does amidst a group of intentional-type wrongdoings, coupled with the presence of the word misconduct in subsection (b), all indicate that the proper construction of this statute lies in construing it as including among its terms only intentional-type wrongdoing, not innocent or negligent but nonreckless wrongdoing. And I think that that's squarely in line with the comments of the chairman of the commerce committee. Furthermore, it seems to me that with a real estate fund limited by law to only \$500,000.00, if we're going to open the flood gates to innocent and negligent misrepresentation claims being made against this fund, there very likely soon wouldn't be any fund to collect for dishonest-type actions on the part of the real estate profession. So I'm going to reverse the real estate commission and award judgment in this case in favor of the appellants.

[2] In our view, the superior court correctly analyzed the question, and thus we affirm the superior court's construction of AS 08.88.460.³

Prior to the establishment of the Real Estate Surety Fund in 1974, real estate brokers were required to obtain a real estate bond. This corporate bond was made payable to the state and was breached if the licensee injured another by a wrongful act or default in the conduct of the business for which the license was issued. In 1974 the legislature created the Real Estate Surety Fund. AS 45.85.010. [§ 1 Ch. 143 SLA 1974] As originally enacted the Real Estate Surety Fund functioned simi-

larly to the surety bond requirement. In relevant part the Surety Fund Act provided that a licensed real estate broker when obtaining or receiving a real estate license, in lieu of obtaining a corporate surety bond, had to pay a bond fee to the commissioner. [AS 45.85.020(n)] Recovery from the newly established surety fund was conditioned upon the claimant first obtaining "a final judgment in a court against a real estate broker . . ." If judgment was not satisfied within thirty days from the court order, the claimant could apply for a post-judgment order directing payment out of the Real Estate Surety Fund.

In 1980 the Real Estate Surety Fund Act was amended, providing for a simpler recovery process. [AS 08.88.450-.500] The 1980 amendment obviated the requirement that the claimant first obtain a civil judgment before filing a claim for reimbursement; instead, the Real Estate Commission was remolded to function in a quasi-judicial role, adjudicating the merits of Surety Fund claims in administrative hearings. [§§ 34-36 Ch. 167 SLA 1980] Procedures governing the Real Estate Commission's administration of Surety Fund claims are provided for in 12 AAC 64.280-.330.

[3] As the superior court correctly emphasized, nothing in the historical development of the Real Estate Surety Fund directly indicates legislative intent as to the scope of the Fund's coverage. Given this background, we think a textual analysis of AS 08.88.460 is controlling.⁴ The apposition of the term "misrepresentation" to the terms "fraud," "deceit," and "conversion" persuades us that misrepresentation should be limited to only wrongful misrepresentations. A widely applied tenet of statutory interpretation is that if "the legislative intent or general meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their associa-

language, the more convincing contrary legislative history must be. See also *City of Homer v. Gough*, 650 P.2d 396, 400 n. 4 (Alaska 1982); see gen. *North Slope Borough v. Soltis Petroleum Corp.*, 585 P.2d 534, 540 (Alaska 1978) (where we first adopted this sliding scale approach).

tion with other associated words and phrases." 2A C. Sands, *Sutherland Statutory Construction*, § 47.16 at 101 (4th ed. 1973); in accord: *United States v. Raynor*, 302 U.S. 540, 58 S.Ct. 353, 82 L.Ed. 413 (1938); *State v. Taylor*, 49 Hawaii 624, 425 P.2d 1014, 1021 (1967); *Heathman v. Giles*, 13 Utah 2d 368, 374 P.2d 839, 840 (1962). Similarly: *Matter of Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1977) (all sections are to be construed together so that all have meaning and no section conflicts with another); *City of Anchorage v. Scavenius*, 539 P.2d 1169, 1174 (Alaska 1975) (each part of a statute should be construed with every other part or section so as to produce a harmonious whole).

[4] In short, we hold that innocent misrepresentations are not within the ambit of

5. We think it appropriate to further note that when the Surety Fund was first established in 1974 and amended in 1980, Alaska did not recognize a cause of action for innocent misrepresentation. In *Devius v. Ballard*, 655 P.2d 757 (Alaska 1982), this court first recognized a cause of action against a real estate broker for innocent misrepresentation.

the term "misrepresentation" as is employed in AS 08.88.460(a). In reaching this conclusion we have considered each of the state's arguments, including legislative history, public policy considerations, and textual analysis. We found none of them persuasive. We affirm the superior court's construction of AS 08.88.460(a) and (b).⁴

AFFIRMED.

MATTHEWS, J., not participating.



6. The amicus has attempted to raise the question of whether on this record any misrepresentation was made. In the context of this case this issue is not before us and thus will not be addressed.

3. The applicable standard of review here is one of independent judgment. *Wien Air Alaska, Inc. v. Dept. of Revenue*, 647 P.2d 1087, 1090 (Alaska 1982).

4. In *State v. Alex*, 646 P.2d 203, 209 n. 4 (Alaska 1982), we held that the plain language of the statute's

an element of the relative nature of the work test. Thus, only if it is determined that Kroll acted as an employer in the course of his construction activities may Donald reasonably be said to have been engaged in work which was "a regular part of the employer's regular work." *Ostrem v. Alaska Workmen's Compensation Board*, 511 P.2d at 1063.⁵

[5] For purposes of the Act, an employer is defined as "a person employing one or more persons in connection with a business or industry coming within the scope of this chapter." AS 23.30.265(12). The Board stated in this regard:

The definition of subsection (12) 'in connection with a business or industry coming within the scope of this chapter' is interpreted to mean *all business or industry is to be considered as covered by the Act* and that interpretation would follow Larson's which includes every person in the service of another under contract. [Emphasis added.]

The Board's broad construction of AS 23.30.265(12) fails to give proper weight to the statutory limitation to employment relationships "in connection with a business or industry." In Larson's terms,⁶ the policy question is whether Kroll's construction activity, either by itself or as an element of his rental activities,⁷ was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or was the construction activity simply a cost-cutting shortcut in what was basically a *consumptive* and not a *productive* roll played by Kroll.⁸

We conclude that the Board's statement with respect to the parameters of the statu-

5. The concept of "regular work" as used in *Ostrem* as part of the test for differentiating between employees and independent contractors is a subclass of "business" as used in AS 23.30.265(12). Whether a person engages in a "business" within the meaning of AS 23.30.265(12), is relevant for purposes of determining the "extent to which claimant's work is a regular part of the employer's regular work." *Ostrem*, 511 P.2d at 1063. The Board's first obligation is to ascertain the nature of the particular business enterprise in which the injury allegedly occurred, and then to determine wheth-

ery definition of an employer reflects an erroneous standard of law. As a result, the threshold issue of whether Kroll's construction activity was sufficient to establish his status as an employer must also be remanded to the Board for further consideration.⁹

REVERSED and REMANDED.



Max BEVINS and Johnson-Bevins Inc.,
d/b/a Star Realty, Appellants,

v.

David L. BALLARD and Linda K.
Ballard, Appellees.

No. 4571.

Supreme Court of Alaska.

Nov. 19, 1982.

Purchasers brought action against vendors and real estate broker alleging, in part, intentional and negligent misrepresentation in describing condition of well on property. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., rendered judgment in favor of purchasers, and broker appealed. The Supreme Court, Burke, J., held that: (1) trial court's dismissal of purchasers' negligence claim against real estate broker precluded broker's liability from resting on a negligent representation

er the work being done by the claimant is a regular part of that business.

6. See 1C A. Larson, *supra* note 2, § 50.21.

7. *Id.* at § 50.24.

8. *Id.* at § 50.21, at 9-70 to 9-71 & nn. 4 and 5. *But see Donald v. Whatley*, 346 So.2d 898 (Miss.1977).

9. *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981).

theory, even though postjudgment amendments are allowed to conform issues tried to evidence, where, subsequent to dismissal, neither party argued negligent misrepresentation in trial briefs, court and parties treated case as one involving innocent misrepresentations, and broker neither expressly nor impliedly consented to trying negligence claim, but (2) real estate broker who made material misrepresentation to purchasers as to condition of well on unimproved property was liable to purchasers, even though representation was innocently made.

Affirmed.

Connor, J., dissented in part and filed an opinion in which Rabinowitz, J., joined.

1. Negligence ⇐2

In determining whether duty exists to provide accurate information once speaker undertakes to speak, factors to consider are whether speaker had knowledge, or its equivalent, that information was desired for serious purpose and that listener intended to rely upon it, foreseeability of harm, degree of certainty that listener would suffer harm, directness of causation, and policy of preventing future harm.

2. Brokers ⇐102

In land sales context, duty to provide accurate information when real estate broker undertakes to speak can arise when broker becomes aware of suspicious facts regarding his or her representations, or when purchaser makes affirmative inquiry and broker fails to check accuracy of subsequent responding representation, or when court determines that public policy requires brokers to undertake certain functions.

3. Pretrial Procedure ⇐693

Trial court's dismissal of purchasers' negligence claim against real estate broker precluded broker's liability for misrepresentations from resting on a negligent representation theory, even though postjudgment amendments are allowed to conform issues tried to evidence, where, subsequent

to dismissal, neither party argued negligent misrepresentation in trial briefs, court and parties treated case as one involving innocent misrepresentations, and broker neither expressly nor impliedly consented to trying negligence claim.

4. Vendor and Purchaser ⇐37(1)

Vendors guilty of even innocent misrepresentation cannot hide behind doctrine of caveat emptor because vendors are presumed to know character and attributes of land conveyed and purchasers are consequently entitled to rely on vendors' reasonable representations.

5. Fraud ⇐13(2)

Owner of land must be both truthful and informed in making any representations, for fraud includes pretense of knowledge where there is none.

6. Brokers ⇐102

Policy favoring liability of real estate brokers for innocent misrepresentation is founded on recognition that purchasers should be entitled to rely on a broker's representations.

7. Brokers ⇐106

Purchaser who relies on a material misrepresentation of real estate broker, even though innocently made, has a cause of action against broker.

8. Brokers ⇐102

Real estate broker who made material misrepresentation to purchasers as to condition of well on unimproved property was liable to purchasers, even though representation was innocently made.

Fredrick P. Pettyjohn, Anchorage, for appellants.

Saul R. Friedman, Hedland, Fleischer & Friedman, Anchorage, for appellees.

Before RABINOWITZ, C.J., CONNOR, BURKE, and MATTHEWS, JJ., and DIMOND, Senior Justice.*

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the

Constitution of Alaska, and Alaska R.Admin.P. 23(a).

OPINION

BURKE, Justice.

This is an appeal from a judgment holding a real estate broker liable for certain misrepresentations made in the course of a real estate transaction.

A. Facts

On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from Josephine, Patricia, and William Ferris. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They subsequently incurred expenses of \$6,935.00 in deepening the well to an adequate level.

Believing themselves the victims of fraudulent misrepresentations, the Ballards sued the sellers, the broker (Bevins), and an employee of the broker (Lucas). Their complaint alleged, in part, intentional and negligent misrepresentation.¹ In addition, it alleged that Bevins and Lucas had a duty to check the well's condition, that Lucas knew there was no functional well, that Bevins

1. The complaint made the following factual allegations:

- (a) Bevins personally inspected the property;
- (b) sellers told Bevins that there was a well drilled on the property;
- (c) sellers failed to disclose to Bevins the incomplete nature of the well, with the knowledge and intent that Bevins would tell potential buyers there was a well;
- (d) sellers represented to the broker's employee that the well was finished, held 36 feet of standing water, and was capable of supporting the reasonable water needs of residents of the house;
- (e) sellers made those representations with the intent that Lucas would tell the buyers;
- (f) Lucas did so represent to the Ballards;
- (g) the representations were false;
- (h) Lucas made the representations with the knowledge they were false;

was vicariously liable for Lucas's acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

After the close of plaintiffs' evidence, the trial court dismissed certain counts of the complaint. First, the court ruled that the broker did *not* have a general duty to inspect the premises. Second, it held that the broker was *not* vicariously liable for the acts of his employee, Lucas. In a subsequent written decision, the court further ruled that Lucas was not liable. It then held that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other for any payment in excess of a pro rata share. While both the sellers and the broker filed timely notice of appeal, only Bevins, the broker, pursues his appeal.

The basis of the broker's liability is not clear. The court found that the sellers were the source of the representation that the well was "good," i.e., capable of supplying the reasonable water needs of the residents. It ruled that the broker had a right to rely on the representations, and thus the sellers were liable (as principals) for the act of Bevins (their broker and thus their agent) who passed on the misrepresentation. The court also found that Lucas passed on the representation intending that

- (i) sellers made the representations knowing they were false, for the purpose of deceiving plaintiffs and inducing them to buy;
- (j) plaintiffs did rely and were induced; and,
- (k) plaintiffs were unable to discover the defect until after purchase.

In addition, the following legal allegations were made:

- (1) Bevins owed plaintiffs a duty to investigate the accuracy of the sellers' representations, and breached that duty (this count was dismissed at the close of plaintiffs' evidence);
- (2) Lucas (broker's employee) owed plaintiffs a duty to investigate, and breached that duty;
- (3) Bevins was vicariously liable for acts of his employee Lucas (this count was dismissed at the close of plaintiffs' evidence); and,
- (4) sellers were vicariously liable for the acts of their agents, Bevins, the broker, and his employee, Lucas.

it be relied upon; Bevins admitted to the same intent. The court further found that the Ballards did so rely, and that their reliance was justified.

Although the court earlier concluded that Bevins had no general duty to inspect, it subsequently held that a duty of inquiry arose when Lucas asked Bevins, on behalf of the Ballards, about the adequacy of the well. The court concluded that Bevins acted unreasonably by simply assuring Lucas that it was a "good well" rather than by investigating. Thus Bevins' liability appears to rest on a negligence theory.

Certain facts are not contested:

1. The listing mentioned a 100 foot well.
2. The well proved to be incomplete, i.e., inadequate to support reasonable water needs.
3. Bevins, the broker, testified that the listing of a well would reasonably lead buyers to assume the well was "good," i.e., adequate.
4. The Ballards relied on the listing and representations that the well was "good."
5. Both Lucas and Bevins intended that the Ballards so rely.

As to the source of the misrepresentation, Bevins testified that he would not have written it on the listing unless it came from the sellers. The sellers, however, denied telling him about it; they testified that Bevins must have misunderstood. The court believed Bevins, concluding that the sellers were the original source of the representation.

B. The Broker's Liability

There are three types of misrepresentations: intentional, negligent, and innocent. While the Ballards did assert an intentional misrepresentation claim against the sellers, they did not do so against Bevins or Lucas.

2. Bevins' liability could be based on a vicarious liability for the acts of his employee Lucas. As we noted in *Black v. Dahl*, 625 P.2d 876, 879 n. 3 (Alaska 1981), a real estate broker can be liable under the doctrine of respondeat superior for the acts of his or her sales-people. However, two of the rulings below preclude resting liability on such a basis. First, at the close of

Thus, we need address only the negligent and innocent misrepresentation claims in this appeal. Bevins' liability to be sustained, must rest on one of these two theories.²

1. Negligent Misrepresentation

The Ballards' third claim for relief stated a cause of action for negligence against Bevins. That claim alleged that Bevins had a duty to "take reasonable steps to determine whether or not the well . . . was a completed well" and had sufficient capacity to support a purchaser's reasonable water needs, that Bevins breached that duty, and that as a direct and proximate result of Bevins' breach the Ballards purchased the property believing the well was completed. As noted, the trial court subsequently dismissed that claim, and the Ballards did not appeal. In its final opinion, however, the trial court imposed liability on grounds that Bevins had a "duty to inquire of the sellers whether the well was, in fact, 'a good well.'" Bevins argues that the court thus held him negligent even though negligence was dismissed from the case and, further, that he was prejudiced thereby because dismissal of the third claim led him to forego a negligence defense.

[1, 2] We recognized the tort of negligent misrepresentation in *Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973), and *Howarth v. Pfeifer*, 443 P.2d 39 (Alaska 1968). Under this theory, Bevins could have been liable for breaching his duty to provide accurate information once he undertook to speak. In determining whether such a duty exists, one must consider: (a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it; (b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suf-

the Ballards' evidence, the trial court dismissed the eighth claim for relief, which had asserted that Bevins was vicariously liable. Second, in its written opinion, the trial court found in favor of Lucas, the salesman. Thus there is no underlying liability for which Bevins could be held vicariously responsible. The Ballards have not appealed these rulings.

fer harm; (d) the directness of causation; and (e) the policy of preventing future harm. *Howarth v. Pfeifer*, 443 P.2d at 42; see *Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d at 494-95.³ In the land sales context, such a duty can arise when a broker becomes aware of suspicious facts regarding his or her representations, or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his subsequent responding representation, or when a court determines that public policy requires brokers to undertake certain functions. See, e.g., *First Church of the Open Bible v. Cline J. Dunton Realty, Inc.*, 19 Wash.App. 275, 574 P.2d 1211 (1978).

[3] We believe, however, that the trial court's dismissal of Ballards' third claim for relief, which was their only negligence claim against Bevins, precludes the broker's liability from resting on a negligent misrepresentation theory.⁴ While Alaska Rule of Civil Procedure 15(b) allows post-judgment amendments to conform the issues tried to

3. In *Transamerica Title*, we upheld submitting the negligence issue to the jury where a title insurance company failed to inform a client that a power of attorney, upon which she was relying in asserting her authority to sell the property, had been revoked. Although the title company was unaware of the revocation, that information was readily available to it. We concluded that the title insurer knew that the seller, its client, desired information about her legal capacity to sell the land, that she intended to rely on that information, and that there was foreseeable harm to her should she be poorly advised. We concluded that the jury could find that the title company had a "duty to speak carefully." We rejected any distinction between the nonfeasance of the title company and the misfeasance in the *Howarth* case. 507 P.2d at 494-95.

In *Howarth*, a vendor sought damages for the alleged negligent misrepresentation by the defendant insurer that a purchaser of vendor's property had obtained fire insurance on the property. We held that assuming the presence of the essential factors establishing a duty of care, those engaged in the insurance business are required to speak with reasonable care.

4. That the court intended to dismiss negligence claims from the case is further evidenced by the following colloquy:

THE COURT: ... I feel that it's the third claim for relief that you seek thereby to impose upon realtors a burden that does not exist except in extraordinary circumstances.

the evidence, and further provides that the failure to so amend "does not affect the result of the trial" on those issues, the rule sets as a threshold the requirement that such issues be "tried by express or implied consent of the parties." We do not believe that this condition was met in the case at bar. Subsequent to the dismissal neither party argued negligent misrepresentation in their trial briefs. The court and parties treated the case as one involving innocent misrepresentations. Bevins neither expressly nor impliedly consented to trying a negligence claim. Accordingly, Bevins' liability cannot rest on a negligent misrepresentation theory.

2. Innocent Misrepresentation

The case went forward against Bevins on an apparent theory of innocent misrepresentation, evidenced by the colloquy quoted in note 4 and the arguments advanced in the trial briefs.⁵ The tort of innocent mis-

That is when there's been—when there has been evidence adduced as to the duty of a realtor to inquire arising from some circumstances directing the attention of a reasonable prudent realtor to some—some—something unusual. In this case it seems to me that this was just an ordinary transaction. That it's rural property, most of which does require that it be serviced by a well. It is incomplete, and if I accept the evidence as it now stands, that it was represented that there was a good well, that that's the end of the matter, that there's no duty on the realtors to go further and inquire whether that is the actual fact. You know, there's nothing unusual about that well that would alert the ordinary prudent realtor of the need to do something about it. To check it out.

MR. FRIEDMAN: Well, if the court finds that there was no duty, then they can't obviously be negligent. But I still ask the court

THE COURT: They—well, they still can be—the defendants still could be—they made the representation, which is—facts show was not true.

MR. FRIEDMAN: Correct.

THE COURT: So that they can be—they can be held liable for having made the same. But not on—not on—(indiscernible) negligence—or negligence theory.

5. The elements of innocent misrepresentation were alleged to a sufficient degree. Paragraph 8. of the Ballards' first claim for relief makes

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representation is defined by section 552C(1) of the Restatement (Second) of Torts (1977) as follows:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Id. The Restatement leaves open the question of whether such a cause of action lies against real estate brokers. *Id.* § 552C, Comment g.

[4, 5] We have recognized a cause of action against the owner of realty who innocently misrepresents its condition to the purchaser. *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980). In *Cousineau*, we granted rescission and restitution to a purchaser where the seller made false statements concerning the highway frontage and gravel content of the purchased land. In so doing, we held that an owner guilty of even innocent misrepresentation could not hide behind the doctrine of caveat emptor. *Id.* at 614-16. This is so because owners are presumed to know the character and attributes of the land conveyed and buyers are consequently entitled to rely on the seller's reasonable representations. See *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977), quoted in *Cousineau v. Walker*, 613 P.2d 608, 615 n. 14 (Alaska 1980). The owner of land must therefore be both truthful and informed in making any representations, for fraud includes the pretense of knowledge where there is none. *Spargna-*

the necessary allegation concerning Bevins' scienter. Paragraph 2 of the fifth claim for relief alleged that Bevins' agent passed on the representation with the intent to cause action in reliance thereon. Finally, paragraph 15 of the first claim for relief alleged actual reliance. In light of this, plus the court's and the parties' arguments concerning Section 552 of the Restatement, we conclude that Bevins was "adequately notified" that the Ballards were asserting a cause of action based on innocent misrepresentations. See *Clary Ins. Agency v. Doyle*, 620 P.2d 194, 201 (Alaska 1980).

pani v. Wright, 110 A.2d 82, 84 (D.C.App. 1954).

The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.⁶

An illustrative case is *Spargnapani v. Wright*, 110 A.2d 82 (D.C.App.1954). There, both the seller and broker were held liable for representing that a house could be heated for a little more than \$100.00 per year, when a defect in the boiler made it impossible to heat the house at all. *Id.* at 85. The broker had merely passed on the seller's information, and neither defendant had knowledge of a defect. Nevertheless, the court sustained liability:

If the broker innocently represented that the heating plant was in workable condition and was mistaken in that representation, or made the representation without knowing whether it was true or false, the injured party may recover in an action for fraud.

... We may assume that the broker was guilty of no deliberate deception and had no actual knowledge of the concealed defect. But on defendants' own evidence their selling agent did not disclaim such knowledge.... The representation... was flagrantly inaccurate, since the defect... made it impossible to heat the house at all.... "Fraud includes the

6. *Sodal v. French*, 35 Colo.App. 16, 531 P.2d 972, 973 (1974); *Spargnapani v. Wright*, 110 A.2d 82, 85 (D.C.App.1954); *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E.2d 328, 331 (1956); *Berryman v. Riegert*, 286 Minn. 270, 175 N.W.2d 438, 442 (1970); *Lawlor v. Schepcr*, 232 S.C. 94, 101 S.E.2d 269, 271 (1957); *Polk Terrace, Inc. v. Harper*, 386 S.W.2d 588, 593 (Tex.App.1965). *Contra Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 625 (1979).

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pretense of knowledge when knowledge there is none."

Id. at 83-84 (citations omitted).

[6] The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:

Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes. Therefore there is a duty on the part of real estate brokers to be accurate and knowledgeable concerning the product they are in the business of selling—that is, homes and other types of real estate. Courts have held in many cases that purchasers are entitled to rely on real estate brokers' statements.

Lyons v. Christ Episcopal Church, 71 Ill. App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 628 (1979) (dissenting opinion).

[7] We find this reasoning persuasive. Parties to real estate transactions frequently do not deal on equal terms. Real estate brokers are licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally. Prospective purchasers recognize this expertise and tend to rely on a broker's representations. Just as purchasers are entitled to rely on an owner's representations, *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980), purchasers should be entitled to rely on the broker's representations. Any other rule would permit brokers to use misleading statements in selling the property, yet remain immune from liability by simply remaining ignorant of the property's true characteristics. Accordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently

7. Some listing agreements contain indemnification provisions, entitling the broker to indemnity from the owner should the broker's communication of the owner's representations engen-

made, has a cause of action against the broker originating or communicating the misrepresentation. See Restatement (Second) of Torts § 552C(1) (1977).

In our view, the consequences of recognizing a cause of action in this situation are entirely beneficial. The presence of a cause of action against the broker would tend to lessen the likelihood of transactions tainted by misinformation and confusion. Additionally, recognizing a cause of action against the broker would provide another source of recovery to the purchaser of defective property. Frequently, the owners may move away, leaving the broker as the only reachable defendant. As between the broker who communicated the misrepresentation, and the purchaser whose only fault was to rely on the broker, we think it preferable that the broker bear any loss caused by misrepresentation. Brokers, in turn, can protect themselves from liability by investigating the owner's statements, or by disclaiming knowledge, by requiring the seller to sign at the time of listing a statement setting forth representations which will be made, certifying that they are true and providing for indemnification if they are not.⁷ See *Goldman v. Hart*, 134 Ga. App. 422, 214 S.E.2d 670 (1975).

[8] Having determined that a cause of action in innocent misrepresentation exists, it is apparent that the judgment below must be affirmed. Bevins does not contest that the listing he prepared mentioned a 100 foot well, that this listing would reasonably lead buyers to assume the well was good, that the Ballards so relied, and that the well was, in actuality, inadequate. These facts establish liability under an innocent misrepresentation theory. See Restatement (Second) of Torts § 552C(1) (1977). The decision below is therefore **AFFIRMED**.⁸

COMPTON, J., not participating.

der liability. See, e.g., *Barnes v. Lopez*, 25 Ariz.App. 477, 544 P.2d 694, 698-99 (1976).

8. This case is distinguishable from *Stepanov v. Gavrilovich*, 594 P.2d 30 (Alaska 1979), where-

CONNOR, Justice, with whom RABINOWITZ, Justice, joins, dissenting in part.

I dissent from the holding that an action for innocent misrepresentation should be permitted against the real estate broker.

When a realtor acts as a mere conduit for passing on information supplied by the seller, he should be under no duty independently to verify that information unless he has reason to believe the information to be false. See *Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 27 Ill.Dec. 559, 39 N.E.2d 623, 625 (1979). Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the "insurer" of the seller's representation.

Although we recognized a claim based on innocent misrepresentation in *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980), that case is distinguishable from a case between a buyer and a broker. Sellers who make representations about their property should be held to the accuracy of the representations, as they are normally in the best position to know the facts. But a broker often has little personal knowledge of the property which he offers for sale. I see no reason to make the broker the guarantor of representations emanating from the seller. I would hold that innocent misrepresentation is not available as a cause of action by the buyer against the broker. Thus, I would reverse the judgment of the superior court. I agree with the balance of the majority opinion.



in we affirmed a judgment in favor of a small "subdivider," in a damage action founded upon the subdivider's innocent failure to disclose undetected permafrost conditions in lots sold to the plaintiffs.

Subdividers are subject to, and protected by, the Alaska Land Sales Practices Act, AS 34.55. Under the act, a subdivider is liable for material misrepresentations or omissions affecting the land, "unless in the case of an untruth or omis-

Laureen BAILEY, Appellant and
Cross-Appellee,

v.

Dennis J. HAAS, Appellee and
Cross-Appellant.

Nos. 6177, 6688.

Supreme Court of Alaska.

Dec. 3, 1982.

Cross appeals were taken from a decision of the Superior Court, Third Judicial District, Kenai, James A. Hanson, J., which was entered in an action brought pursuant to the Uniform Reciprocal Enforcement of Support Act. The Supreme Court, Connor, J., held that: (1) failure of petition to include a prayer for arrearages did not justify dismissal of the claim where respondent had notice of the claim for arrearages at the very latest by time motion for an order of support was filed, and (2) request for arrearages in child support need not be reduced to judgment by petitioning state prior to recovering such arrearages in an Uniform Reciprocal Enforcement of Support Act action.

Reversed and remanded.

1. Parent and Child ⇄ 3.4(2)

Failure of petition to initiate support proceedings under Uniform Reciprocal Enforcement of Support Act to include a prayer for arrearages did not justify dismissal of the claim where respondent had notice of the claim for arrearages at the very latest by time motion for an order of support was filed. AS 25.25.010-25.25.270.

sion it is proved that . . . the person offering or disposing of subdivided land did not know and in the exercise of reasonable care could not have known of the untruth or omission." AS 34.55.030(a). Thus, a "subdivider" is not liable for innocent misrepresentations. Such liability is barred by the statute. This protection, however, is not available to the defendants in the case at bar, since they are not "subdividers."



ALASKA ASSOCIATION OF REALTORS®

3301 Denali Street, Suite 200 • Anchorage, Alaska 99503
Telephone 907-276-0655

Ken Brown - 1986 president

April 9, 1985

Honorable M. Mike Miller
Chairman House Judiciary Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Representative Miller,

The Alaska Association of REALTORS testified before the House Labor and Commerce Committee in opposition to H.B. 232.

Our position has not changed and we are not in favor of this Bill. This Bill would reverse compromise legislation which was passed last year. Last year's legislation only became effective October, 1984. This Bill would also reverse a May, 1984 Supreme Court decision regarding innocent misrepresentation. We do not feel that sufficient time has passed to evaluate the effect of those decisions.

As an Association, we feel strongly that the public is served by strict application of the Alaska Statutes regarding licensure and examination enforcement. We also believe that those licensees who are harming the public should be strictly, severely and promptly dealt with.

On the matter of the \$250 Surety Fund filing fee, we have felt and still feel that this figure is perhaps too large.

As a part of an ongoing process, the industry, the Real Estate Commission and the Administration, are making legislative and regulatory changes which will be proposed this summer. Part of the suggested legislation will include the lowering of the \$250 Surety Fund filing fee.

This proposed legislation will be before you in 1986 for consideration and refinement. For this reason, we feel passage of H.B. 232 is premature.

Sincerely,

Betty Lou Cipra
Betty Lou Cipra
1985 President

BLC/dd



A PERFORMANCE REPORT ON THE
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION

September 19, 1985

Audit Control Number

08-1224-86-R

Commissioner, Department of
Commerce and Economic Development

Loren H. Lounsbury

Deputy Commissioners, Department of
Commerce and Economic Development

Terry Elder
Greg Baker

Members of the
Alaska Real Estate Commission

Chairman
Vice-Chairman
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Member
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Member
Member

Dave Ribacchi
Barbara J. Hill
LaVerne Collins
Gilbert Serrano
John E. Benson
Barry L. Brown
Iola Robinson

STATE OF ALASKA

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811-3300

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

October 29, 1985

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 and 44 of the
Alaska Statutes (sunset legislation), the attached report is
submitted for your review.

A PERFORMANCE REPORT ON THE
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION

September 19, 1985

Audit Control Number

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Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

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PURPOSE AND SCOPE OF THE REPORT

Purpose

In accordance with the provisions of Alaska Statutes 24.20.271(1) and 44.66.050 (sunset legislation), an examination of the Alaska Real Estate Commission was conducted to determine if the Commission has been operating in an effective, efficient, and economical manner.

As required by legislative intent, this report shall be considered during the legislative oversight function in determining whether the Alaska Real Estate Commission should be reestablished. The law currently specifies that this Commission will terminate on June 30, 1986, but will continue until June 30, 1987 for the purpose of concluding its affairs.

The policy and audit approach utilized by the Division of Legislative Audit for performance reports can best be described as "audit by exception." This methodology focuses audit effort on areas of an auditee's operations that have been identified by a preliminary survey as having a high degree of probability for needing improvements.

Therefore, by design, finite audit resources are used to identify where and how improvement can be made and little time is devoted to reviewing well-run operations or programs. Consequently, this report highlights those areas needing improvement and does not emphasize those operations and programs that are properly functioning.

Scope

The major areas of our examination were the licensing, examination, administration, complaint, and affirmative action functions of the Commission. We reviewed and evaluated the following:

1. Applicable statutes and regulations.
2. Tests of records and documents of the Commission.
3. Discussions with Commission members and staff of the Commission.
4. Complaints filed with the Commission and the Ombudsman's Office.
5. Questionnaires sent to Commission members and Alaska licensed real estate brokers, associate brokers, and salespersons.

ORGANIZATION AND FUNCTION

The Alaska Real Estate Commission (AREC) was established and operates under Title 8, Chapter 88 of the Alaska Statutes. It is a regulatory commission consisting of five real estate brokers or associate brokers and two public members.

The Commission regulates persons licensed as real estate brokers, associate brokers, and salespersons by:

1. Examining and issuing licenses to qualified applicants.
2. Establishing or amending rules and regulations necessary to enforce State statutes.
3. Holding hearings to revoke or suspend the license of a person violating real estate statutes or regulations.
4. Prosecuting, through the Department of Law, violations of real estate statutes and regulations.

AREC is also authorized to conduct real estate clinics, meetings, or educational institutes for the purpose of raising the standards of the real estate business and the competency of licensees.

Real estate associate brokers and brokers must pass an examination and have had at least 24 months of active and continuous experience as a real estate salesperson. Additionally, an applicant for an associate broker or broker license may not be under indictment for any felony involving moral turpitude or five or seven years, respectively, have elapsed since completing a sentence for a felony involving moral turpitude. A broker differs from an associate broker in that a broker must be an owner of a real estate business or employed as a broker by a corporation or partnership. An associate broker has met the statutory requirements of a broker, but is employed by a real estate broker.

A real estate salesperson must pass an examination; be at least 19 years old; not be under indictment for, or completed the sentence imposed if convicted of, any felony involving moral turpitude; and be employed by a real estate broker.

Real estate licensees must pay a surety fund fee, in lieu of obtaining a corporate surety bond, when obtaining or renewing their licenses. These fees are deposited in the Real Estate Surety Fund and are to be used for reimbursement of losses suffered as a result of fraud, misrepresentation, deceit, or the conversion of trust funds on the part of a real estate licensee. Claims for reimbursement require a

\$250 filing fee and payment is made by AREC after a hearing is held. The Surety Fund balance in excess of \$250,000 may be appropriated for educational purposes.

Chapter 167, SLA 1980 gave the Commission the power to appoint an executive director, employ assistants, and approve the appointment of an investigator or auditor. Prior to enactment of this legislation, the Commission received staff support from the Division of Occupational Licensing.

REPORT CONCLUSION

Policy Issues

This report contains policy issues raised as a result of our evaluation of various Commission practices. The final policy decisions affecting these practices are not within the scope of the report but require legislative consideration. In debating these issues, the oversight committees should consider the findings and recommendations presented in this report so the potential impact of policy changes can be evaluated.

Report Conclusion

In our opinion, the Alaska Real Estate Commission (AREC) should continue to regulate and license real estate professionals. The regulation and licensing of the profession is necessary because of the potential for substantial economic loss resulting from the business practices of unqualified, incompetent, or dishonest real estate practitioners.

However, substantial improvement needs to take place in the operations of the Commission. The Office of Management and Budget (OMB) conducted a comprehensive management audit of AREC and issued its report, "Management Audit Report on the Alaska Real Estate Commission" dated December 1984. We support the recommendations made by OMB, but note little progress to date in implementation of those recommendations. Implementation of the recommendations contained in this report and the OMB report (see Appendix D) would enable AREC to perform more effectively and efficiently.

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FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Alaska Real Estate Commission (AREC) should revise the procedures for processing and closing licensing complaints.

Currently AREC uses procedures for processing licensing complaints which are ineffective and inefficient. A copy of each complaint file is sent to an AREC commissioner. This "coordinating commissioner" is supposed to assist the Accountant III (REC investigator/auditor hereinafter referred to as investigator) in his investigation by offering real estate expertise. For each complaint recommended for closure, the commissioner is supposed to review the file and approve or disapprove the closure recommendation. During the next Commission meeting, those complaints approved for closure by individual commissioners are officially voted closed by the entire Commission.

The first sunset review of AREC by Legislative Audit dated May 7, 1979, found fault with commissioners being informed as to the facts and being involved in the investigations and recommended that investigation procedures be changed and revised to develop an accurate and proper system for handling complaints. A follow-up review dated June 4, 1981, recommended that a formal system of investigative procedures be developed, approved, and documented prior to the investigative responsibility being transferred from the Division of Occupational Licensing. An Ombudsman investigation completed on April 13, 1983, included recommendations addressing delays in the management and processing of licensing complaints. An Office of Management and Budget (OMB) management report dated December 1984 found that AREC lacked a formal, structured procedure for processing license complaints.

The executive director and investigator have established informal procedures in response to these recommendations that conflict with those in use by other regulatory licensing boards under Occupational Licensing. We recommend AREC take a proactive, rather than reactive approach and revise its procedures to include the following:

1. Case files should not be copied and sent to a commissioner. This is the single most compromising element of the present system.
2. The investigator should fully investigate every complaint. This may involve nothing more than reading the complaint form and supporting documents, but the case file should contain evidence of the investigation conducted.

3. The investigator should prepare a generic summary of the complaint, evidence, investigation, and conclusion reached. If that conclusion recommends closure due to no violation or no jurisdiction, the summary should be sent to each commissioner at least two weeks prior to the next meeting for action by the entire Commission. At the meeting, the complaint could either be referred back to the investigator for further action or closed.
4. If the investigator determines a violation has occurred, an accusation or statement of issues would be prepared as under the current procedures. If a hearing is requested, the commissioners would act on the hearing officer's proposed decision.
5. These procedures should be formalized and supported by time standards. Implementation of these procedures would allow the investigator to be more efficient. Cases recommended for closure would be acted on at the next meeting and the carrying over of cases to the next meeting due to the absence of one or more commissioners would not occur. The amount of copying and mailing costs, as well as time spent tracking complaints, would be reduced substantially.

Recommendation No. 2

AREC should actively pursue recovery of Surety Fund claims paid and the associated hearing costs from the involved licensees.

Alaska Statute 08.88.071(b) allows AREC to suspend the license of a broker, associate broker, or salesperson until an agreement is reached on terms and conditions for the repayment to the Real Estate Surety Fund of the money awarded to the claimant and the costs of hearing the claim. To date, repayment by the involved licensee has been more voluntary than required. Of the approximately \$430,000 of claims and associated hearing costs paid from the Surety Fund, only fifteen percent or \$65,000 has been recovered.

The Attorney General's (AG) Office must file suit to collect these payments. Several of the larger payouts have recently been turned over to an Assistant AG for action. The Commission has been trying to develop a process to recover through Small Claims Court, which has a \$2,000 limit, those claims under \$5,000 which the AG's Office will not prosecute. This process has not been implemented due to lack of time by the investigator to follow through.

We recommend that judgement, execution, and collection be undertaken on a test basis as soon as possible through the appropriate trial court in order to refine the procedures necessary for recovery of monies owed to the Surety Fund.

Initially, active licensees should be notified that their licenses will be suspended if an agreement on repayment is not reached. If these procedures reveal inadequate authority for recovery, statute changes may be necessary. However, lack of action because a problem may exist is not acceptable. These procedures must be formalized and written in order to facilitate recovery.

Recommendation No. 3

AREC should undertake a major revision of Alaska Statutes, Title 8, Chapter 88.

The Attorney General's Office as well as staff and commissioners of AREC pointed to statutes which needed revision. Some sections need clarification while others appeared to give inadequate authority to the Commission to carry out its duties. Some examples follow:

1. Duties of the Commission. AS 08.88.071.
(a)(3) could be changed to a simple statement such as: "hold hearings and order disciplinary sanctions against a person who violates this chapter or the regulations of the commission." A separate section is needed delineating grounds for denial, suspension, and revocation of a license. A section on penalties or disciplinary sanctions is usually found in other chapters of Title 8.

(b) should be relocated to Article 5, the Real Estate Surety Fund. Combined license and Surety Fund claim hearings are now being scheduled and suspension of a license until repayment of the claim should not be confused with suspension for a licensing violation. Qualifying language may be needed to distinguish between suspension for a violation and suspension for a repayment agreement in those combined hearings. Repayment of the Surety Fund claim does not "buy back" the license suspended for a violation.
2. Entitlement to license. AS 08.88.171.
This section should be retitled "eligibility for license" or "qualifications for license." At this time, a broker or associate broker is still "entitled" to a salesperson license even though the Commission revokes the broker or associate broker license. If this is not the intent of the Legislature, a provision should be included that licensees lose their eligibility for all licenses upon license revocation and that license eligibility can only be reinstated by the Commission.
3. Reinstatement of lapsed license. AS 08.88.241.
The Commission has taken the position that a broker, associate broker, or salesperson whose license has

lapsed for more than two years must be reexamined before reinstatement and must begin at the salesperson level. If the intent of the legislation is that the broker and associate broker licenses cannot be reinstated after examination, that language should be inserted in the statutes. The current policy is to reinstate any license lapsed less than two years without examination.

4. Out-of-state licenses. AS 08.88.261.
This section should be repealed. The State of Alaska does not have reciprocity agreements with other states. License by endorsement is available to a person who holds a valid active real estate license issued by another state upon passing an examination in Alaska law and meeting the requirements of AS 08.88.171.
5. Education. AS 08.88.091.
Authority to sell informational materials at a price designed to recover costs and deposit the money in the Real Estate Surety Fund should be added. The Commission should establish guidelines for charges for copies exceeding one per licensee.

Specific language should be added regarding the liability of the licensee to repay Surety Fund claims and hearing costs paid from the Surety Fund. Procedures should be developed in consultation with the Attorney General's Office to standardize and expedite recovery efforts. Other areas needing clarification are definitions of "real estate" and "employed" as used in Chapter 88.

This project should be prioritized. A reimbursable services agreement with the Department of Law, if necessary, or a contract with a private attorney would assure the time needed to accomplish this goal.

In addition, the Commission should revise the regulations, License Biennium and License Renewal, 12 AAC 64.070 and .071. A staggered renewal should be instituted to spread the workload more evenly throughout the biennium. An alternative to staggering license renewal within the biennium could be to seek statutory change to allow for a triennial renewal and staggering license renewal over three years. This change would also necessitate a change to the fee section of the statutes, AS 08.88.221.

Recommendation No. 4

★< AREC should analyze the need for an additional clerical position.

The staff of AREC consists of an executive director, an investigator, a licensing examiner, two half-time hearing officers, a secretary, and a clerk typist. Staff complains

of a workload such that they are unable to complete their assigned duties. The investigator and hearing officers were added to staff with no increase in clerical support. Each of these positions generate a large amount of clerical work. The investigator spends a great deal of time tracking complaint files and Surety Fund claims because no one else is available to do it. The license examiner must do most of the typing and filing of that position due to lack of support. The hearing officers currently have a backlog of proposed decisions awaiting typing. Additionally, AREC is now involved in a computer conversion which will require a substantial amount of time of the licensing examiner and investigator to develop programs to assist them in their duties. When the programs are developed all the information for the licensing history and complaint files must be entered in the system. Also, 1986 is the biennial renewal year which historically overwhelms the staffing available.

Thirty-one percent of the licensees responding to a questionnaire had complaints regarding the handling of applications, fees, or other administrative duties of the Commission. An accurate, up-to-date roster of licensees is still not available. The Commission has not published its quarterly newsletter since February 1985, which was a copy of the statutes and regulations. The executive director states he does not have time to manage the appropriation from the Surety Fund for education. However, a position has recently been authorized, funded by the Surety Fund, for an educational coordinator. This position may also require clerical support.

We believe the need for additional temporary clerical help is critical at this time. The license examiner and investigator must have time available to assist in development of computer programs. Existing staff must have assistance with the biennial renewal of licenses and data input. The Commission should try to make the funding available from the FY 86 budget, seek assistance from any departmental typing pool, or request supplemental funding. Implementation of the recommendations such as changing the license renewal date and computerizing operations may reduce the workload and streamline operations so that a permanent position is not necessary in the long-term. Further analysis will be needed after the changes are instituted. However, we believe temporary assistance is critically necessary at this time.

Recommendation No. 5

The investigator should develop a time accounting system which would document investigative actions.

During the course of our review, fifty license complaint files were examined from FY 84 and 85. Documentation

included the license complaint form and supporting documentation, a checklist, priority evaluation form, copies of the ten-day letters sent and the responses received, and the investigator's report/recommendation. Twenty-five of the fifty files had one or more errors noted such as lack of forms, incomplete forms, no commissioner signatures on closure recommendations, or missing files. It was extremely difficult to determine what, if any, investigation was done. Some files were referred back to the investigator marked "investigate" but no further action had been documented.

The investigator was unable to estimate how much time he spent on investigations, tracking Surety Fund claims, and other assigned duties. Implementation of a time accounting system, in conjunction with the computerized complaint tracking system, would analyze his workload as well as document investigative procedures.

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analysis of Commission activities relate to the public need factors defined in the "sunset" law. This analysis is not intended to be all inclusive, but addresses those areas we were able to cover within the scope of our review.

- I. The extent to which the board, commission, or program has operated in the public interest.
 - A. The Commission has held five meetings each year during the last three years.
 - B. The Commission has implemented regulations to administer Surety Fund claims.
 - C. The Commission has issued fifteen stop orders to prevent unlicensed activity from continuing.
 - D. The Commission has sponsored seminars and publications on real estate matters.

- II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.
 - A. Procedures for processing licensing complaints are ineffective and inefficient (see Recommendation No. 1). Additionally, complaint files often lack documentation to determine if investigations are properly conducted (see Recommendation No. 5).
 - B. The statutes governing the Commission are not clear and concise and need revision (see Recommendation No. 3).
 - C. Existing staff needs temporary clerical assistance through completion of computer programming and the biennial license renewal (see Recommendation No. 4).
 - D. The Commission requires increasingly more legal assistance from the Department of Law, Attorney General's Office, which may not be available under the present budgetary program.

- III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.
- A. The Commission succeeded in having some obsolete or vague statutory requirements repealed or amended. Changes were also enacted to the Surety Fund claim process. A claimant is required to pay a \$250 filing fee, which may not be in the public's best interest.
- IV. The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.
- A. Commission meetings are announced to the public. Time is scheduled to hear from interested persons.
- B. Comments on regulation changes are solicited by announcement in public newspapers and notices to interested associations.
- V. The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.
- A. The Commission announces proposed regulation changes or additions in newspapers in accordance with the Administrative Procedures Act.
- B. The Commission formed a Project Action Committee composed of commission members, licensees, and the public. Task forces for statutes and regulations, education, and agency were established to make recommendations in those areas.
- VI. The efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.
- A. We found no instances where the Commission did not respond to public inquiries.
- B. During the last three years, forty-nine complaints have been closed by the Office of the Ombudsman. Ten of these were found to be justified or partially justified and most involved unreasonable delay or lack of action on licensing complaints and Surety Fund claims.

VII. The extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public.

A. The Commission gave the licensing examination each month in Anchorage and quarterly in Fairbanks, Kenai, and Juneau. Approximately 7,500 persons took the examination with 3,100 or 41 percent passing during the past three years. Licenses issued totalled 2,329.

B. The Commission revoked, suspended, or denied thirty licenses in the last three years. As of June 30, 1985, the Commission had 176 open license complaints.

VIII. The extent to which State personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity or interest.

A. We found no evidence of problems in this area.

IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

A. Please refer to the previous section, Findings and Recommendations, and the December 1984 report by OMB included in its entirety as Appendix D of this report.

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APPENDIXES

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APPENDIX A

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION
SCHEDULE OF GENERAL FUND REVENUES
COMPARED WITH OPERATING EXPENDITURES
For Fiscal Years 1983 through 1985
(UNAUDITED)
(Note 1)

	<u>Fiscal Year</u>		
	<u>1983</u>	<u>1984</u>	<u>1985</u>
<u>Revenues</u>	<u>\$ 130,941</u>	<u>\$477,074</u>	<u>\$229,200</u>
<u>Expenditures:</u>			
Personal services	195,737	195,066	245,089
Travel	18,011	19,752	18,890
Contractual services	91,241	83,700	42,734
Supplies and materials	5,312	3,282	4,243
Machinery and equipment	490	428	1,236
<u>Total Expenditures</u>	<u>310,791</u>	<u>302,228</u>	<u>312,192</u>
<u>Revenues over (under)</u> <u>Expenditures</u>	<u>\$(179,850)</u>	<u>\$174,846</u>	<u>\$(82,992)</u>

SCHEDULE OF REVENUES

<u>Unrestricted Revenues</u>	<u>Amount</u>	<u>Collection Time</u>
Examination fee	\$ 50	With taking the examination
Reciprocity fee	100	With granting of license through reciprocity
Initial license fee	100	With issuance of license
Renewal-active license	100	Biennially
Renewal-inactive license	50	Biennially
Amendment or transfer of license fee	5	When amending or transferring

Note 1: The information included in this schedule was obtained from the accounting records of the Alaska Real Estate Commission. The information has not been audited by us and, accordingly, we express no opinion on it.

APPENDIX B

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION
SCHEDULE OF EXAMINATION STATISTICS
For Fiscal Years 1983 through 1985

	<u>Fiscal Year</u>		
	<u>1983</u>	<u>1984</u>	<u>1985</u>
<u>Brokers and Associate Brokers</u>			
Number of examinees	425	442	302
Number passed	190	186	156
Percentage pass rate	<u>44.7%</u>	<u>42.1%</u>	<u>51.7%</u>
<u>Salespersons</u>			
Number of examinees	2,305	2,436	1,604
Number passed	83	1,018	694
Percentage pass rate	<u>36.4%</u>	<u>41.8%</u>	<u>43.3%</u>
<u>Total</u>			
Number of examinees	2,730	2,878	1,906
Number passed	1,029	1,204	850
Percentage pass rate	<u>37.7%</u>	<u>41.8%</u>	<u>44.6%</u>
<u>Initial Licenses Issued</u>	<u>708</u>	<u>939</u>	<u>682</u>

APPENDIX C

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION
SUMMARY OF RESPONSES TO A
REAL ESTATE LICENSEE QUESTIONNAIRE

Are you licensed as a (please circle one of the following):

Broker	Associate Broker	Salesperson	<i>Not Designated</i>
38	25	29	15

	<u>Yes</u>	<u>No</u>	<u>N/O*</u>
1. Do you believe that it is in the public's best interest that the following professions be licensed?			
a) Brokers	<u>99%</u>	<u>1%</u>	<u>0%</u>
b) Associate Brokers	<u>97%</u>	<u>3%</u>	<u>0%</u>
c) Salespersons	<u>98%</u>	<u>2%</u>	<u>0%</u>
2. Do you believe that the Real Estate Commission has operated in the public's best interest?	<u>84%</u>	<u>9%</u>	<u>7%</u>
3. Do you have any complaints regarding the handling of applications, fees, or other administrative duties by the Commission?	<u>31%</u>	<u>63%</u>	<u>6%</u>

Please explain if answered Yes.

Most prevalent answer was that the processing of applications, renewals, and complaints is not timely.

*No/Opinion

APPENDIX C

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION
SUMMARY OF RESPONSES TO A
REAL ESTATE LICENSEE QUESTIONNAIRE

	<u>Yes</u>	<u>No</u>	<u>N/O</u>
4. Do you believe the examination and screening process for licensure is performed adequately by the Commission?	<u>73%</u>	<u>22%</u>	<u>5%</u>
Please explain if answered No.			
<i>Most prevalent answer was that requirements should be stricter.</i>			
5. Do you believe that applicants for real estate licenses should be required to complete real estate courses before they are licensed?	<u>67%</u>	<u>27%</u>	<u>6%</u>
6. Do you believe that continuing education should be required for the following to renew their licenses?			
a) Brokers	<u>56%</u>	<u>37%</u>	<u>7%</u>
b) Associate Brokers	<u>53%</u>	<u>37%</u>	<u>10%</u>
c) Salespersons	<u>54%</u>	<u>37%</u>	<u>9%</u>
7. Do you believe licensing by reciprocity should be continued?	<u>76%</u>	<u>18%</u>	<u>6%</u>
8. Does the license examination cover material which is not pertinent or relevant to actual practice?	<u>48%</u>	<u>33%</u>	<u>19%</u>

Please explain if answered Yes.

Most prevalent answers were that the examination is too technical, and more emphasis should be placed on professional ethics.

APPENDIX C

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
ALASKA REAL ESTATE COMMISSION
SUMMARY OF RESPONSES TO A
REAL ESTATE LICENSEE QUESTIONNAIRE

9.	Has the Commission handled complaints fairly?	<u>47%</u>	<u>14%</u>	<u>39%</u>
10.	Do you believe the Commission should conduct broker trust account audits on a random basis?	<u>60%</u>	<u>32%</u>	<u>8%</u>
11.	Do you believe the Commission has adequate revocation and suspension powers to be effective?	<u>81%</u>	<u>8%</u>	<u>11%</u>
12.	Do you believe the Commission should be allowed to levy fines for enforcement of regulations?	<u>59%</u>	<u>28%</u>	<u>13%</u>
13.	Do you believe the Commission has discriminated against minorities?	<u>0%</u>	<u>86%</u>	<u>14%</u>

Response Rate:

Number of Questionnaires Sent: 250
Number of Responses Received: 107
Response Rate: 42.8%

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**Management Audit Report
On The
Alaska Real Estate Commission**

Division of Management
December 1984

OMB

STAFF PAPERS AND REPORTS

STATE OF ALASKA
BILL SHEFFIELD, GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET

STATE OF ALASKA

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET

DIVISION OF MANAGEMENT

BILL SHEFFIELD, GOVERNOR

POUCH AM
JUNEAU, ALASKA 99811
PHONE: (907) 465-3568

December 11, 1984

Mr. John T. Shively
Chief of Staff
Office of the Governor
Pouch A
Juneau, AK 99811

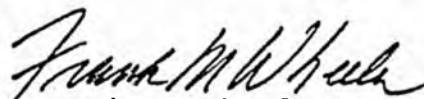
Dear Mr. Shively:

We are pleased to submit our Management Audit Report on the Alaska Real Estate Commission (AREC). The audit was requested by Barbara Hill, AREC Chairman.

This report provides specific recommendations for improving the Commission's licensing, license complaint, and surety fund claim operations. This report also identifies the need for improving the Commission's current office automation and internal management control.

AREC is presently taking action to improve its operations based on our recommendations. An implementation project, under the direction of AREC Commissioner Dave Ribacchi, should be completed by September 1985.

Sincerely,



Frank M. Wheeler
Associate Director

Enclosure

cc/enc: Carol Derfner, Special Staff Assistant
Office of the Governor

Lois Cook, Director
Division of Administrative Services
Department of Commerce and
Economic Development

Barbara Hill, Chairman
Alaska Real Estate Commission

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SUMMARY

The Alaska Real Estate Commission (AREC) regulates the State's real estate profession by examining prospective licensees, issuing licenses, investigating license complaints, and holding hearings to suspend or revoke licenses. AREC is also responsible for adjudicating surety fund claims from victims of fraud, deceit, misrepresentation, and conversion of trust funds by licensees.

At the request of AREC Chairman Barbara Hill, the Office of Management and Budget (OMB) conducted a management audit of AREC. This report shows that AREC could improve its licensing, license complaint, and surety fund claim operations. The report also identifies the need for improving the Commission's current office automation and internal management control.

LICENSING

AREC could improve its licensing operations by:

- Verifying that license candidates have passed the licensing examination before issuing licenses;
- Prorating initial license fees within the licensing biennium;
- Establishing the license renewal date as the first of the month following each licensee's birthday;
- Using the current ten-year license certificate as a permanent license certificate;
- Updating the licensee register;
- Initiating a cooperative information network between the Commission, Alaska Association of Realtors, and multiple listing services to periodically compare each other's licensee registers; and
- Identifying licensees with lapsed licenses who are currently engaged in real estate business.

LICENSE COMPLAINTS

AFEC could improve its license complaint operations by:

- Establishing a formal, structured procedure for processing license complaints;
- Re-evaluating the investigator position;
- Discontinuing to close complaints "without prejudice" and establishing an administrative closure process;
- Providing complainants and respondents with closure letters immediately following complaint closures; and
- Revising the license entitlement statute to read "Eligibility for License" and including a provision that licensees will lose their eligibility for all licenses upon license revocation.

SURETY FUND CLAIMS

AREC could improve its surety fund claim operations by:

- Establishing a minimum fund balance for the Real Estate Surety Fund instead of the current maximum fund balance;
- Combining license action and surety fund claim hearings;
- Reducing the current \$250 filing fee to a more reasonable amount, such as \$50, or discontinuing the fee if surety fund claims are included with license complaints;
- Re-evaluating the staff hearing officer position;
- Proceeding to recover paid claims and hearing costs from licensees; and
- Returning the two \$10,000 warrants found in Commission files to the State treasury.

OFFICE AUTOMATION

AREC could improve its operations by:

- Replacing the current Wang word processing system with a computer system, such as a Wang VS System 80 if it meets needs; and
- Considering to replace the current daisy-wheel printer with a higher speed printer.

INTERNAL MANAGEMENT CONTROL

AREC could improve its operations by:

- Establishing standard policies and operating procedures; and
- Delegating authority in writing to its staff.

OTHER ISSUES

Other issues which should be addressed by AREC include:

- Ensuring the confidentiality of open investigative files;
- Conducting audits of broker trust accounts;
- Developing an operations manual for commissioners; and
- Forming joint committees between AREC and the Alaska Association of Realtors to study areas of common concern.

AGENCY COMMENTS

Based on the recommendations in our draft report, AREC is taking action to improve its operations. AREC Commissioner Dave Ribacchi has been appointed project manager to coordinate the Commission's implementation of our recommendations. During the implementation project, Commissioner Ribacchi will utilize joint committees between AREC and the Alaska Association of Realtors. Senior OMB Analyst Greg Moyer, who conducted the management audit, will assist Commissioner Ribacchi and the joint committees.

INTRODUCTION

The Alaska Real Estate Commission (AREC) was established in 1964 to regulate the State's real estate profession. AREC regulatory responsibilities include:

- examining prospective real estate licensees;
- issuing real estate licenses to qualified applicants;
- conducting investigations to determine whether real estate agents have violated statutes or regulations; and
- holding hearings to suspend or revoke licenses of real estate agents who violate statutes or regulations.

AREC is also authorized to conduct educational clinics or seminars for the purpose of raising the standards of the real estate industry and the competency of licensees.

LICENSEES

There are currently a total of about 5,500 licensed real estate agents in Alaska. Of this total, approximately 3,900 are actively employed as real estate agents, 600 are inactive, and 1,000 are lapsed (licenses not renewed by real estate agents).

Of the 3,900 active licensees, approximately 1,400 are associate brokers or brokers, and 2,500 are salespersons. A broker differs from an associate broker in that a broker is an owner of a real estate business or is employed as a broker by a corporation. An associate broker has met the statutory qualifications of a broker, but is employed by a real estate broker.

LICENSE REQUIREMENTS

For a real estate broker or associate broker license, an applicant must pass an examination, be a State resident, have had 24 months of continuous work experience as a real estate salesperson, and have not engaged in conduct demonstrating unfitness to be a broker.

For a real estate salesperson license, an applicant must pass an examination, be a resident of the State, be employed by a real estate broker, and have not engaged in conduct demonstrating unfitness to be a salesperson.

LICENSE RENEWAL

Currently, all real estate licenses are renewed biennially on the first of February in even-numbered years. Licenses were last renewed on February 1, 1984. The next renewal will be on February 1, 1986.

LICENSE FEES

The fee schedule for real estate licenses is as follows:

	<u>License Fee</u>	<u>Surety Fee 1/</u>	<u>Process Fee</u>	<u>Total Fees</u>
<u>Initial License</u>				
Salesperson	\$100	\$40		\$140
Assoc. Broker/ Broker	\$100	\$125		\$225
<u>License Changes</u>				
Transfer			\$5	\$5
Name change			\$5	\$5
Address change			\$5	\$5
Inactivation			\$5	\$5
Reactivation			\$5	\$5
<u>Renewal</u>				
Active Salesperson	\$100	\$40		\$140
Active Broker or Assoc. Broker	\$100	\$125		\$225
Inactive Salesperson	\$50			\$50
Inactive Broker or Assoc. Broker	\$50			\$50

1/ AREC places these fees in the Real Estate Surety Fund to be used for making monetary settlements to victims of fraud, deceit, intentional misrepresentation, and conversion of trust funds by real estate agents.

During FY 84, which included a renewal of all licenses, AREC collected fees totaling approximately \$845,000. Of this amount, about \$292,000 was credited to the Real Estate Surety Fund and about \$553,000 was credited to the General Fund.

AREC ORGANIZATION

AREC consists of seven members: five real estate brokers or associate brokers, and two public members appointed by the Governor, with confirmation of the Legislature.

AREC staff consists of an executive director, two half-time hearing officers, an auditor, a licensing examiner, a clerk typist, and a secretary.

PURPOSE AND SCOPE

Our review was conducted at the request of Barbara Hill, Chairman of the Alaska Real Estate Commission. The review had two purposes. The first purpose was to assess the effectiveness and efficiency of AREC operations, systems, and management methods. The second purpose was to provide recommendations for any needed improvements regarding operating efficiency and effectiveness which would enhance service delivery or reduce present costs.

During our review, we performed the following steps:

- Reviewed applicable statutes, regulations, and AREC policies and procedures;
- Interviewed Commission members and staff, and Alaska Association of Realtors officials;
- Documented and evaluated the Commission's workloads, staffing, and management methods;
- Reviewed and analyzed current AREC systems and procedures for examining prospective licensees, issuing and renewing licenses, investigating license violations, and adjudicating license complaints and surety fund claims;
- Reviewed statutes, regulations, and procedures of other states' real estate commissions; and
- Attended two Commission meetings and the National Association of Real Estate License Law Officials (NARELLO) annual meeting.

LICENSING

AREC licensing responsibilities are critical to regulating the State's real estate profession. These responsibilities include examining prospective licensees, collecting license fees, renewing licenses, and maintaining a current license register. Our review found that AREC could improve its operations in each of these areas as discussed below.

LICENSING EXAMINATION

In Alaska, candidates for a real estate license must pass a licensing examination. Currently, an average of 200 candidates a month take the Alaska real estate licensing examination. The Educational Testing Service (ETS), which is under contract to administer the examination statewide, provides each candidate who takes the examination with a pass/fail notice. ETS also provides AREC with a pass/fail listing on microfiche.

Candidates who pass the licensing examination may apply to AREC for a real estate license. On the license application, candidates must provide the date they passed the examination and the examination site. With this information, AREC can verify whether candidates actually passed the examination by checking their names on the ETS pass/fail listings. However, our review found that AREC has been issuing real estate licenses without verifying that candidates actually passed the licensing examination. According to the AREC license examiner, AREC has relied on information provided by candidates on the license application.

Issuing licenses without verifying examination results defeats the purpose of examining license candidates. By not verifying examination results, there is a remote possibility that some real estate licenses have been issued to candidates who have failed the examination or have never taken the examination.

LICENSE FEES

Our review found that initial license fees would be more equitable if the fees were prorated within the licensing biennium. Currently, broker/associate broker candidates and salesperson candidates must pay the total license fees of \$225 and \$140 respectively when applying for their initial licenses. Current AREC regulations prohibit prorating fees within the licensing biennium. By not prorating fees, some new licensees are required to pay another \$225 or \$140 in renewal fees even though their initial licenses were applied for and received a month or two prior to the renewal date.

If AREC would prorate initial license fees, we envision the fees being prorated from the first of the month following date of initial license application to date of renewal. (The date of initial license application would be the postmark date if application is mailed or AREC receipt date if application is delivered.)

LICENSE RENEWAL

Our review found that license renewals could be accomplished more efficiently if licenses were renewed biennially based on each licensee's birthday. Currently, all real estate licenses are renewed biennially on the first of February in even-numbered years. To renew over 5,000 licenses at the same time, AREC must commit the majority of its staff to send renewal notices, open mail, receipt fees, review renewal applications, issue licenses, and update licensee data. The latest license renewal in February 1984 required staff commitment from December 1983 to May 1984. During this period, other AREC functions such as investigating license complaints, monitoring surety fund claim hearings, and publishing the AREC newsletter were disrupted.

By establishing the license renewal date as the first of the month following each licensee's birthday, AREC would have twelve license renewals instead of one. This renewal process would spread the administrative workload over the entire year allowing time for the AREC staff to perform its other functions with minimal disruption. Both the AREC executive director and license examiner support this renewal process. In addition, real estate commissions in Idaho, Oregon, and Washington have switched to this renewal process to eliminate the burden of renewing all licenses at the same time.

If AREC would establish the license renewal date based on each licensee's birthday, we envision a transition renewal in February 1986. Licenses would be renewed from February 1, 1986, to the first of the month following each licensee's birthday in 1987. Total renewal fees (license and surety fees) would be prorated based on the schedule shown on the following page.

<u>Birthday Month</u>	<u>Date License Renewed to</u>	<u>Broker/Associate Broker Renewal Fees</u>	<u>Salesperson Renewal Fees</u>
January	February 1, 1987	\$113	\$ 70
February	March 1, 1987	122	76
March	April 1, 1987	131	82
April	May 1, 1987	141	88
May	June 1, 1987	150	93
June	July 1, 1987	159	99
July	August 1, 1987	169	105
August	September 1, 1987	178	111
September	October 1, 1987	188	117
October	November 1, 1987	197	123
November	December 1, 1987	206	128
December	January 1, 1987	216	134

The next license renewal would be two years from the above dates and biennium renewal fees for brokers/associate brokers and salespersons would be \$225 and \$140 respectively.

LICENSE CERTIFICATE

For license renewals prior to the February 1984 renewal, AREC provided licensees with license certificates that were valid for only one licensing biennium. However, for the February 1984 renewal, AREC provided licensees with certificates that are to be valid for five licensing bienniums. Each license certificate has five spaces for renewal validation stickers. This use of validation stickers is similar to the system used for motor vehicle licensing.

We support the use of validation stickers instead of printing and issuing new license certificates at each renewal. However, we believe the current ten-year license certificates could be permanent license certificates by continuing to place new validation stickers over existing stickers. Real estate commissions in Montana, Rhode Island, South Dakota, and Tennessee currently have permanent license certificates with validation stickers.

If AREC would establish the license renewal date as the first of the month following each licensee's birthday, we envision the validation stickers to read as shown in the example below.

EXAMPLE

For a licensee with a birthday on May 3, the following validation sticker would be sent to the licensee at the February 1, 1986 renewal:

EXPIRES 6-1-87

During May 1987, the license would again be renewed and the following validation sticker would be sent to the licensee:

EXPIRES 6-1-89

LICENSEE REGISTER

AREC is required by statute to maintain a current register of licenses. AREC currently maintains an alphabetical register of licensees on its Wang word processor. The register is kept on 23 separate system documents which group licensees alphabetically by the first letter of their last names. For each licensee, the register provides the licensee's real estate office and address, license number, and license expiration date (currently January 31, 1986 for all licensees).

We reviewed the accuracy of the AREC licensee register by comparing its contents with a current licensee register provided by the Anchorage Multiple Listing Service (MLS). Our review found inaccuracies in the AREC licensee register. Specifically, we found:

- The AREC register did not account for some licensees. During our review, we found five licensed real estate agents (including one broker) not listed on the

register. Each of these licensees are actively engaged in real estate business.

- The AREC register listed some licensees twice - once as active and once as lapsed.
- The AREC register did not have current company names and addresses for some real estate firms.

Concerning licensees not accounted for on the register, the AREC licensing examiner told us that her predecessor failed to enter some licensees on the register during the 1982 renewal. Specifically, these licensees included some brokers with low license numbers and some licensees with license numbers between 7000 and 7999.

Lapsed Licenses

The AREC licensing examiner estimates that 1,000 licensees on the AREC licensee register have lapsed licenses. Given the inaccuracies found in the AREC licensee register, we are concerned that some licensees with lapsed licenses may not have received notices of the February 1984 license renewal. Though licensees have the responsibility to renew their licenses with or without renewal notices, we believe that AREC should make an attempt to identify licensees with lapsed licenses who are currently engaged in real estate business. For example, AREC could send a notice to brokers instructing the brokers to verify the license status of each associate broker and salesperson under their supervision.

RECOMMENDATIONS

In the area of licensing, we recommend that AREC:

1. Verify that license candidates have passed the licensing examination before issuing licenses. It is our understanding that the AREC license examiner has already been instructed by the executive director to implement this recommendation.
2. Prorate initial license fees within the licensing biennium.
3. Establish the license renewal date as the first of the month following each licensee's birthday.
4. Use the current ten-year license certificate as a permanent license certificate by continuing to place new validation stickers over existing stickers.

5. Update the licensee register. For a cost of \$85, Wang Laboratories could take the 23 system documents of the current alphabetical register and provide AREC with a register in sequential order by license number. This new register could then be compared with information in the Commission's hard-copy license folders which are also kept in sequential order by license number. This register could also be compared with an AREC notebook which recorded license issues in sequential order prior to use of the word processor.
6. Initiate a cooperative information network between the Commission, Alaska Association of Realtors, and multiple listing services to periodically compare each other's licensee registers.
7. Identify licensees with lapsed licenses who are currently engaged in real estate business. AREC could send a notice to brokers instructing the brokers to verify the license status of each associate broker and salesperson under their supervision.

LICENSE COMPLAINTS

As a regulatory agency, AREC is responsible for investigating complaints alleging licensee violations of State statutes or regulations. AREC is also responsible for suspending or revoking licenses of real estate licensees who actually violate statutes or regulations. Our review found that AREC could improve its operations in each of these areas as discussed below.

COMPLAINT STATISTICS

As of September 14, 1984, AREC showed the following license complaint statistics:

<u>Year</u> <u>Complaints</u> <u>Filed</u>	<u>Total</u> <u>Complaints</u> <u>Filed</u>	<u>Total</u> <u>Complaints</u> <u>Closed</u>	<u>Total</u> <u>Complaints</u> <u>Open</u>
1977	86	85	1
1978	108	99	9
1979	203	200	3
1980	114	110	4
1981	119	101	18
1982	151	115	36
1983	184	103	81
1984 to date	<u>170</u>	<u>54</u>	<u>116</u>
Total	<u>1,135</u>	<u>867</u>	<u>268</u>

Of the 268 open complaints, only 24 complaints were designated as being in active investigation and 17 were designated as having license actions in progress. The remaining 227 open cases were in backlog status.

We reviewed 61 of approximately 240 closed license complaints which were in AREC files awaiting closure letters. Our review found that the average processing time for these complaints from date of complaint filing to date of recommended closure was 14 months.

COMPLAINT PROCESSING

Our review found that AREC lacks a formal, structured procedure for processing license complaints. AREC currently processes complaints based on informal procedures established by the executive director and auditor. We believe these procedures were implemented before being fully developed and are currently

ineffective and inefficient. Examples of these procedures are shown below.

1. For each complaint actively investigated, AREC has a procedure to forward a copy of the complaint file to an AREC commissioner. The commissioner supposedly becomes an "investigating commissioner" who will assist the AREC auditor during the investigation. However, we found that neither the auditor nor commissioners know what is expected of the "investigating commissioner." The procedure has never been formalized to identify the commissioners' investigative duties.
2. For each complaint recommended for closure, AREC has a procedure to forward the original complaint file to an AREC commissioner. The commissioner is supposed to review the file, approve or disapprove the closure recommendation, and return the file to the AREC auditor. During the next Commission meeting, those complaints approved for closure by individual commissioners are officially voted closed by the entire Commission. We question the entire Commission voting to close complaints when the complaints were only reviewed by one commissioner. We also question the mailing of original complaint files to commissioners, especially when we were told that four original files have been lost through these mailings.

We believe that AREC needs a formal, structured procedure for processing complaints from date of initial inquiry to completion of hearing. The procedure should provide a sequence of processing stages and internal time standards (processing days from date of complaint filing). We also believe that the processing stages should be supported by statutes and regulations.

If AREC would establish a formal, structured procedure for processing license complaints, we envision the following major processing stages, internal time standards, and needed statute and regulation sections:

<u>Processing Stage</u>	<u>Internal Time Standard</u>	<u>Statute Section</u>	<u>Regulation Section</u>
1. <u>INQUIRY</u>			
AREC documents the volume and nature of questions answered and problems resolved by telephone, mail, and personal contact.			Acceptance of Inquiry Record of Inquiry

	<u>Processing Stage</u>	<u>Internal Time Standard</u>	<u>Statute Section</u>	<u>Regulation Section</u>
2.	<u>COMPLAINT</u>		Complaint	Complaints by Individuals Complaints by Commission
	AREC sends a copy of the complaint and an interrogatory to respondent.	10 days		
	Respondent provides AREC with completed interrogatory.	30 days		
3.	<u>STAFF INVESTIGATION</u>		Investigation	Investigation Procedures Determination Procedures
	AREC prepares investigative plan of action.	45 days		
	After investigation, AREC makes a determination whether or not complaint is supported by substantial evidence.	90 days		
4.	<u>STIPULATION</u>		Stipulation	Stipulation Procedures
	If the complaint is supported by substantial evidence, AREC provides respondent with proposed terms of stipulation, i.e., license suspension for specific time period.	120 days		
	Respondent accepts or rejects the proposed stipulation.	150 days		

	<u>Processing Stage</u>	<u>Internal Time Standard</u>	<u>Statute Section</u>	<u>Regulation Section</u>
5.	<u>HEARING</u>		Hearing	Commencement of Hearing Process
	If proposed stipulation is rejected by respondent, a hearing commences.	180 days	Order	Subpoenas
				Notice of Hearing
				Conduct of Hearing
				Hearing Officer's Recommended Decision
				Orders by Commission
				Hearing Record

By establishing a complaint processing procedure supported by internal time standards, statutes, and regulations, we believe that AREC would be more accountable to licensees and the public.

INVESTIGATOR

The AREC auditor is responsible for investigating license complaints filed with the Commission. The auditor is an Accountant III with no prior investigative experience.

Current AREC statutes state that "the executive director shall appoint, with approval of the commission, a full-time investigator or auditor." We understand that an auditor was appointed because investigations may involve audits of broker trust accounts. However, we found that the auditor has conducted only three trust account audits since his appointment three years ago.

We believe AREC should re-evaluate its investigator position. In our opinion, the State's class specification 7768, Investigator III, includes the knowledge and skills needed by AREC. We note that each investigator within the State's Division of Occupational Licensing is an Investigator III.

Closure Letters

AREC currently has about 240 closed license complaints which are awaiting closure letters to complainants and respondents. These complaints were closed by the Commission between 1982 and 1984. Given that the usual license complaint involves two brokers, two salespersons, and a complainant, we estimate that approximately 960 respondents and 240 complainants have not received closure letters.

We believe that AREC has the responsibility to provide complainants and respondents with prompt notices of complaint closures. AREC currently has a form letter which could be prepared immediately following closures.

For the 240 closed license complaints currently awaiting closure letters, AREC should consider employing a student intern or other part-time employee to prepare the estimated 1,200 closure letters. Given that some of these complaints were filed years ago, the mailing addresses of complainants and respondents will have to be verified.

COMPLAINT CLOSURE

Our review found that the majority of complaints closed by AREC are closed for the reason of limited staff resources, not lack of substantial evidence. We reviewed 61 of approximately 240 closed complaints which were in AREC files awaiting closure letters. Almost all of the complaints we reviewed were voted closed by the Commission "without prejudice" -- meaning that the complaints, if investigated, would probably prove that license violations occurred, but the violations are probably not severe enough for using staff resources to investigate. Though the AREC auditor told us that these complaints could be reopened for investigation at a later time, we question the closing of complaints which may be supported by substantial evidence. We also question the time and money spent to officially close complaints which may be reopened; i.e., mailing complaint files to/from commissioners for review of staff recommended closures and voting to officially close complaints at Commission meetings.

If AREC would discontinue the closing of complaints "without prejudice," we envision the following complaint closure process:

1. After receipt of the respondent's completed interrogatory (within 30 days of complaint filing), AREC staff makes a determination based on the weight of the evidence whether or not the complaint warrants further investigation.

2. If the AREC staff determines that the complaint does not warrant further investigation, the staff administratively closes the complaint and notifies the complainant and respondent. By regulation, the complainant may apply to the Commission's chairman for a reconsideration of the staff's determination to close the complaint. The application must be in writing and filed within 30 days after receipt of closure notice unless the chairman grants an extension. The chairman will review the entire complaint file and may hear oral argument from the parties. If the chairman grants the complainant's application for reconsideration, the chairman will remand the complaint to staff for further investigation.

LICENSE ACTION

If AREC proves that a licensee has violated State statutes or regulations, the licensee's real estate license could be revoked or suspended by the Commission. However, we found that a broker or associate broker is still "entitled" to a salesperson license even though AREC revokes the broker or associate broker license. Current AREC statute 08.88.171, Entitlement to License, has no provision for barring a broker's or associate broker's entitlement to a salesperson license after revocation of the broker or associate broker license.

If AREC would revise its license entitlement statute, we envision the following statutory changes:

1. Change AS 08.88.171 from "Entitlement to License" to "Eligibility for License."
2. Include in AS 08.88.171 a provision that licensees lose their eligibility for all licenses upon license revocation. Also, include a provision that license eligibility can only be reinstated by the Commission.

RECOMMENDATIONS

In the area of license complaints, we recommend that AREC:

1. Establish a formal, structured procedure for processing license complaints. The procedure should include a sequence of processing stages with internal time standards. The processing stages should be supported by statutes and regulations.

2. Re-evaluate the investigator position. We believe that the position requires the knowledge and skills of an Investigator III, not an Accountant III.
3. Discontinue closing complaints "without prejudice." We believe AREC should establish an administrative closure process for complaints.
4. Provide complainants and respondents with closure letters immediately following complaint closures. For the approximately 240 closed complaints currently awaiting closure letters, AREC should employ a student intern or other part-time employee to prepare the estimated 1,200 letters.
5. Revise its license entitlement statute to read "Eligibility for License" and include a provision that licensees lose their eligibility for all licenses upon license revocation.

SURETY FUND CLAIMS

In 1974 the Real Estate Surety Fund was established to provide monetary settlements to victims of fraud, deceit, misrepresentation, and conversion of trust funds by licensees. From 1974 to 1980, victims had to receive court judgments against licensees before claims were paid. However, in 1981 AREC was given the responsibility of adjudicating surety fund claims. Our review found that AREC could improve its operations in this area as discussed below.

CLAIM STATISTICS

As of September 14, 1984, AREC showed the following surety fund claim statistics:

<u>Year Claims Filed</u>	<u>Total Claims Filed</u>	<u>Total Claims Paid</u>	<u>Total Amounts Paid</u>
1981	52	3	\$11,943
1982	92	18	\$62,612
1983	123	14	\$67,644
1984 to date	101	6	\$43,017

A total of 197 open claims were in backlog status.

FUND BALANCE

The Real Estate Surety Fund is totally funded by surety fees assessed from licensees. Current AREC statutes state that the fund may not exceed \$500,000. The fund's current balance is about \$650,000. We understand that the excess \$150,000 will be transferred to the General Fund.

Given that the fund balance currently exceeds its statutory limit, we question the Commission's continued assessment of surety fees. By continuing to assess surety fees, AREC is collecting monies from licensees for the General Fund, not the Surety Fund. Licensees actually pay the General Fund twice - once from their license fees and another from their surety fees.

AREC is attempting to resolve this situation by introducing legislation to raise the fund limit from \$500,000 to \$850,000. However, we estimate that the fund balance will probably exceed the \$850,000 limit after the February 1986 renewal. New legislation would have to be introduced to raise the fund limit again.

Based on the National Association of Realtors suggested pattern for real estate license law, we envision a statute provision for a minimum fund balance instead of the current maximum fund balance. As long as the balance remains above the minimum, licensees would not be assessed surety fees. However, if the balance becomes less than the minimum, licensees would be assessed surety fees during the next license renewal.

By establishing a minimum fund balance, AREC and licensees could realize the following benefits:

1. Based on the dollar amount of claims paid in prior years, AREC could set a minimum fund balance which would not require continuous statutory revisions as is currently being experienced with the maximum fund balance.
2. By not having to assess surety fees while the fund balance remains above the minimum, AREC could have less administrative costs.
3. By not having to pay surety fees while the fund balance remains above the minimum, brokers/associate brokers and salespersons could save \$125 and \$40 respectively in renewal fees.

HEARINGS

Our review found that AREC could combine license action and surety fund claim hearings. Currently, AREC holds separate hearings for adjudicating license actions and surety fund claims. However, given that a surety fund claim can only be awarded if a license violation occurs, we envision the following changes:

1. One AREC complaint form for complainants to report license violations and any monetary damages resulting from the violations. (AREC currently has separate forms for license complaints and surety fund claims.)
2. Staff investigations to determine if reported license violations are supported by substantial evidence and to verify any monetary damages. (AREC currently investigates only reported license violations; surety fund claims are automatically scheduled for hearing with no staff review or investigation.)
3. One hearing to determine license actions to be taken against licensees who violate State statutes or regulations and to determine complainants' monetary settlements from the Surety Fund (AREC currently holds separate hearings.)

HEARING OFFICERS

In November 1984 two half-time hearing officers joined the AREC staff to adjudicate surety fund claims and license actions. The AREC executive director estimates that the hearing officers will complete the backlog of surety fund claims in eight to ten months. Given this estimate, we believe that AREC should re-evaluate its hearing officer position. AREC may only need one half-time hearing officer in FY 86. The other half-time hearing officer might be utilized as a hearing advocate to assist in AREC investigations and hearing preparations.

FILING FEE

As of October 4, 1984, persons filing surety fund claims must pay a \$250 filing fee. We understand that the filing fee was established to discourage the filing of frivolous claims. Since AREC does not investigate surety fund claims, all claims including those considered frivolous must be adjudicated by a hearing.

We believe that the \$250 filing fee is excessive, if not unnecessary. A \$50 filing fee, as currently charged by small claims court, would be more reasonable. In addition, a filing fee would not be necessary if surety fund claims were included with license complaints. Frivolous claims would be identified during staff investigations of license complaints.

CLAIM RECOVERY

According to AREC statute 08.88.490, when the Commission pays a surety fund claim, "the Commission shall be subrogated to all of the rights of the claimant to the amount paid and the claimant shall assign all of his right, title, and interest in that portion of the claim to the Commission." Based on this statute provision, AREC has attempted to recover paid claims and hearing costs from the licensees who committed the license violations. However, our review found that AREC recovery attempts have been minimal. We found that AREC has sent only one notice, dated July 31, 1984, to the licensees requesting payment.

As of September 14, 1984, AREC showed the following claim recovery statistics:

<u>Number of Licensees</u>	<u>Total Amount of Claims Paid and Hearing Costs Incurred</u>	<u>Total Amount Recovered From Licensees</u>
33	\$200,680	\$33,597

CLAIM WARRANTS

During our review, we found two \$10,000 warrants which should have been returned to the State treasury. Both warrants were issued as surety fund claim payments, but the warrants were never forwarded to the claimants. One warrant, issued December 1981, was being held pending the outcome of an appeal made by the respondent. However, the warrant is no longer redeemable because of its age. The other warrant, issued March 1984, was not forwarded to the claimant due to a May 1984 court interpretation which disallowed payment of the claim.

RECOMMENDATIONS

In the area of surety fund claims, we recommend that AREC:

1. Establish a minimum fund balance for the Real Estate Surety Fund. Surety fees would only be assessed if the fund balance becomes less than the minimum.
2. Combine license action and surety fund claim hearings. AREC should also consider including surety fund claims with license complaints.
3. Reduce the \$250 filing fee to a more reasonable amount, such as \$50. However, if AREC includes surety fund claims with license complaints, the filing fee should be discontinued.
4. Re-evaluate the staff hearing officer position. Given the executive director's estimate of future workload, AREC may only need one half-time hearing officer in FY 86.
5. Proceed to recover paid claims and hearing costs from licensees.
6. Return the two \$10,000 warrants found in Commission files to the State treasury.

OFFICE AUTOMATION

Office automation is essential for AREC to operate an effective and efficient regulatory agency. Our review found that AREC could improve its current automation as discussed below.

CURRENT AUTOMATION

Our review found that AREC needs to improve its current office automation. AREC currently utilizes a Wang word processing system. We found that this system is being utilized far beyond its intended capabilities and is supplying only a fraction of the automated support needed by AREC.

In our opinion, AREC could use a computer system, not just the word processing system, to support the following areas:

1. Licensing - For each licensee, AREC needs computer support which will capture and provide access to current and historical data including:
 - a. personal data
 - b. licensing examination results
 - c. initial license date and number
 - d. current license status
 - e. history and dates of status changes
 - f. current employer
 - g. employer history and dates
 - h. current license complaint or surety claim
 - i. history of disciplinary actions
 - j. renewal and expiration dates

2. Office Registration - For each real estate office, AREC needs computer support which will capture and provide access to current and historical data including:
 - a. office address/telephone number
 - b. date office registration submitted
 - c. current office status
 - d. type of business/list of partners or corporation officers
 - e. current broker in charge/license number
 - f. history of brokers in charge with dates of employment and dates of termination
 - g. trust account name/number/bank

3. License Complaints and Surety Fund Claims - For each license complaint and surety fund claim, AREC needs computer support which will capture and provide access to current and historical data including:
 - a. case number
 - b. date initiated
 - c. complainant/address/telephone number
 - d. respondent/address/telephone number
 - e. history of actions taken and dates
 - f. next actions to be taken and dates
 - g. current case status
 - h. history of status changes

If AREC would improve its current automation, we envision a separate field (screen of information) for each licensee. Each field would be accessed by the licensee's license number. In addition, each field would provide other reference numbers such as the license number of the licensee's employing broker, the identification number of the licensee's real estate office, and file numbers of any license complaints or surety fund claims.

By including license numbers and other reference numbers, a computer could manipulate information to produce licensee rosters by real estate office or license type (broker, associate broker, or salesperson). To produce these rosters on the current word processing system, the AREC license examiner must sort information in 23 separate system documents. A recent roster of brokers took 1½ days to compile.

IMPROVED AUTOMATION

The Department of Commerce and Economic Development is taking steps to improve the Commission's office automation. The department's computer systems specialist is currently reviewing two alternative systems. These systems include:

1. Wang Office Information System (OIS) 140. This system is primarily a high-powered word processor with limited data processing capabilities.
2. Wang VS System 80. This system is a computer with high-volume, interactive computing capabilities. This system is currently being utilized by the State's Division of Occupational Licensing in Juneau.

Given the information processing needs of AREC, we believe AREC needs a computer system such as the Wang VS System 80, not another word processor. According to the department's computer systems specialist, the department has identified a refurbished VS system 80 which is available for purchase. If purchased,

this computer system could be utilized by AREC and other department operations in Anchorage.

We believe the department's computer systems specialist should also consider replacing the Commission's printer. We found the current daisy-wheel printer to be quite slow in printing licenses and licensee rosters. For example, a recent roster of brokers (approximately 750 names and addresses) took almost four hours to print.

RECOMMENDATIONS

In the area of office automation, we recommend that AREC:

1. Replace the current word processing system. Of the two alternative systems being considered for AREC (Wang OIS 140 and Wang VS System 80), the VS system is assumed to adequately support the Commission's information processing needs; a formal needs assessment would confirm its desirability.
2. Consider replacing the current daisy-wheel printer. We believe that AREC operations would benefit by having a higher speed printer.

INTERNAL MANAGEMENT CONTROL

To increase operational efficiency and effectiveness, the Commission needs to improve its internal management control. Specifically, we found that the Commission needs to establish two essential elements of internal management control as discussed below.

STANDARD POLICIES AND PROCEDURES

Our review found that the Commission has not established standard policies and operating procedures to give direction to staff decisions, and to set bounds within which such decisions and resulting actions are acceptable to the Commission. According to the AREC executive director, staff currently receive verbal directions from individual commissioners.

If the Commission would establish standard policies and operating procedures, we envision the following advantages for AREC:

1. Staff effort could be economized. It would be unnecessary for the staff to redecide the same issues.
2. Delegation of authority could be facilitated. Staff would be expected to proceed with actions so long as the situations are covered by the policies and procedures.
3. Control could be made easier. Policies and procedures would lead to uniformity of staff actions.

DELEGATED AUTHORITY

Our review also found that the Commission has not delegated authority to give its staff the right to decide and the power to carry out decisions within the staff's responsibilities. During our review, we witnessed staff frustration as a result of not being given the authority to carry out responsibilities.

If the Commission would formally delegate authority to its staff, we believe that the delegation should be spelled out in writing.

RECOMMENDATIONS

In the area of internal management control, we recommend that AREC:

1. Establish standard policies and operating procedures.
2. Delegate authority in writing to its staff.

OTHER ISSUES

During our review, we identified other issues which should be addressed by AREC. These issues and our recommendations are provided below.

CONFIDENTIALITY OF INVESTIGATIVE FILES

The Commission's open investigative files include unsubstantiated allegations of professional misconduct. A recent Attorney General opinion for AREC states that information in the Commission's open investigative files may not be withheld from public inspection. However, a prior Attorney General opinion for the State's Division of Occupational Licensing states that the division's open investigative files may be withheld from public inspection. Since AREC and the Division of Occupational Licensing have similar information in their investigative files, we question the different Attorney General opinions. In our opinion, the subjects of unsubstantiated allegations have a constitutional right not to have the information made public until the AREC investigation is completed and the relevant facts are presented at a public hearing.

Recommendation

We recommend that AREC request an explanation from the Attorney General concerning the different opinions given to AREC and the Division of Occupational Licensing. To ensure the confidentiality of open investigative files, we recommend that AREC statutes include a provision that all records of investigation and information obtained by the Commission during an investigation are confidential and may not be made available by the Commission for public inspection.

TRUST ACCOUNT AUDITS

The AREC executive director estimates that over fifty percent of the complaints filed with the Commission involve improper trust account management. Given this estimate, we question the lack of trust account audits currently being conducted by AREC. As previously mentioned, the AREC auditor has conducted only three audits of broker trust accounts in the last three years. Each of these audits was conducted as part of a complaint investigation.

If AREC could employ an Investigator III to handle complaint investigations, the current AREC auditor could conduct trust account audits on a full-time basis. We envision these audits being conducted as a service to brokers. Any accounting or

procedural deficiencies found and corrective actions needed would be discussed with brokers during exit conferences.

Recommendation

If staff resources would be available, we recommend that AREC conduct trust account audits to identify and resolve problems before the problems cause complaints to be filed with the Commission.

OPERATIONS MANUAL FOR COMMISSIONERS

AREC commissioners do not have an operations manual which could include:

- current statutes and regulations;
- delegated authority to staff;
- by-laws;
- standard policies and operating procedures;
- case law;
- forms; and
- other information which the commissioners deem appropriate.

Recommendation

We recommend that AREC develop an operations manual. This manual would provide excellent orientation material for new commissioners.

AREC/ALASKA ASSOCIATION OF REALTORS

We found that both the Alaska Real Estate Commission and the Alaska Association of Realtors (AAR) share the common goal of having effective and efficient regulation of the State's real estate profession. Based on this common goal, we believe that joint AREC/AAR committees could be utilized to study common concerns such as continuing education for licensees and statute/regulation revisions.

Recommendation

We recommend that the Alaska Real Estate Commission and the Alaska Association of Realtors form joint committees to study common concerns.

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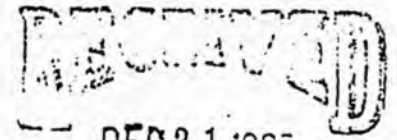
BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

POUCH D
JUNEAU, ALASKA 99811
PHONE: 465-2500

OFFICE OF THE COMMISSIONER

December 30, 1985



DEC 31 1985

LEGISLATIVE
AUDIT

Mr. Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
P.O. Box W
Juneau, AK 99811

Dear Mr. Wilkerson:

Thank you for the opportunity to comment on your preliminary audit report on the Alaska Real Estate Commission.

Enclosed is the response from the Alaska Real Estate Commission on "A Performance Report on the Department of Commerce and Economic Development, Alaska Real Estate Commission, September 19, 1985."

Sincerely,


Loren H. Lounsbury
Commissioner

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122785a
Enclosure

RECEIVED

DEC 31 1985

LEGISLATIVE
AUDIT

STATE OF ALASKA
MEMORANDUM

To: Loren Lounsbury
Commissioner
Dept. of Commerce & Economic Dev.

DATE: December 20, 1985

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

Re: Answer to Preliminary Report of the Division of Legislative Audit

The real estate commission has reviewed the preliminary report of the Division of Legislative Audit and submits the following response:

Recommendation No. 1

The commission concurs with this recommendation and has implemented procedures that comply with the recommendations set out in the report. Procedures implementing each of the five points specifically mentioned have been adopted. The procedures now in place are attached (Attachment # 1).

Recommendation No. 2

The commission concurs with this recommendation. The commission has referred several major claims to the attorney general for collection. The commission is also submitting an application for membership in the Anchorage Credit Bureau so that it can be a source of credit information about licensees who have suspended licenses due to non repayment of the fund. The commission is also supporting an increase in the small claims limit to \$5000.

The authority to suspend licenses until the fund is repaid, without an additional hearing became effective October 2, 1984. Counsel advised that this authority applied to claims filed since that time. Commission policy and practice is to suspend the license of any licensee against whom an award is granted until the fund is repaid or satisfactory arrangements for repayment are made. The commission was advised that even with the statutory authority to suspend a license when the fund is not repaid it is necessary to advise the licensee, prior to the hearing, that this may occur. Licensees are now so notified and the order to suspend the license is contained in the final decision, again upon advice of counsel or hearing examiner as to the requirements for "due Process".

Effective recovery of most claims, particularly large ones requires that the commission execute against property or assets of the parties. This requires that the commission have court judgements. The commission feels that

effective recovery will, therefore, require additional assistance and time from the AG. The commission is also seeking statutory authority to execute on orders of payment out of the surety fund as though they were judgements, without further extended court proceedings once an award has been sustained on appeal or the time for appeal has tolled without appeal being filed.

Prior to the "suspension" clause being added to the statute the commission attempted collection in 1983. It sent letters to all licensees advising of the possibility of court action if the fund were not reimbursed. This attempt was largely ineffective due to the commission's inability to actively pursue the claims in court.

Recommendation No. 3

The commission concurs with this recommendation. The commission has requested that an attorney be assigned to assist with this on numerous occasions during the past nine years. During 1985 the commission formed a Project Action Committee one of the tasks of the committee was the preparation of recommendations for statutory amendments that the commission could submit for consideration during its Sunset" review. The commission is submitting the results of this committee's work for consideration by the legislature. The issues specified in the LBA report as well as numerous others are addressed.

The commission concurs with the specific changes recommended in points 1 through 5 in the recommendation.

The commission is using a new renewal system for 1986-87 biennium. Before changing the dates for renewal the commission is going to evaluate the efficiency of this system as well as its cost effectiveness. Recent computer technology may make the current biennium clerically manageable and less costly than going to a Monthly or Birthdate renewal. The commission is not locked into one system over another but does not wish to introduce a new system until it is sure that it will not be introducing additional costs at the same time.

Recommendation No. 4

The commission concurs. An additional clerical position is desperately needed at this time.

Recommendation No. 5

The commission concurs and a time accounting system is now in effect.

Analysis of Public Need

The commission generally concurred with the findings of this section. The commission however notes that managerial and policy changes of the past 18 months have just begun to produce noticeable effects. The rate of complaint closures and license actions has begun to show dramatic increase.

In response to Item III the commission notes that it supported a filing fee of \$50 for a surety claim. The \$250 filing fee was enacted over recommendations from the commission and the industry that a lower fee be

adopted. There have been two known instances where claimants reported that they would need additional time before they could file a claim because they needed to obtain the money to pay the fee. There have been no substantiated instances at this time that a claim with at least face validity was not filed due to the amount of the fee.

The commission is currently reviewing options for the conduct of routine trust account audits including the possibility of developing a self-audit program that will enable the commission to identify problems in a more cost effective manner while at the same time offering the licensees a valuable educational and self help tool.

0179M

Complaint Investigative Procedures Checklist

1. Complaint Receipt: and evaluation

- Day a. The Complaints Clerk will:
- [1] (1) log in the complaint with assignment of a complaint number;
 - [1] (2) establish a complaint file to include:
 - (a) a procedural checklist;
 - (b) a contact record sheet;
 - [1] (3) forward the file to the Investigator.
 - [10] (4) send ten-day letters to identified licensees;
 - (5) post responses to the file and forward them to the Investigator for evaluation.
- b. The Investigator will:
- [1-3] (1) assign a priority classification;
 - [1-3] (2) assign a classification as to type of alleged violation;
 - (3) identify the licensees to be contacted for response to the complaint (and any surety claim that accompanies the complaint);
 - (4) initiate an investigative report under paragraph 2a.

2. Complaint evaluation:

- [1-3] a. The investigative report will include:
 - (1) allegation(s) of the complainant;
 - (2) violations that appear to be present;
 - (3) evidence that supports the allegation(s);
 - (4) probable outcome of the complaint;
- [30] b. Ten-day letter responses received. For failure to respond, initiate subpoena procedures in paragraph 8.
- [30] c. The Investigator will evaluate the responses and decide:
 - (1) to investigate further, or
 - (2) to close:
 - (a) complete the investigative report for the file;
 - (b) summarize the complaint for:
 - 1 the weekly report to the Director;
 - 2 the report for the next Commission meeting.

3. Investigation:

- [45] a. Write a work plan to detail the work required to complete the investigation and when the work will be accomplished. The work plan will be reviewed by the Executive Director.
- [90] b. Interview witnesses.
- [90] c. Identify needed additional documentation and obtain it.
- d. Record contacts and other work done on the complaint on the contact record sheet inside the complaint folder. The time taken for that particular entry will also be recorded.

4. Hearing:

- [150] a. Complete the Investigative Report.
- [150] b. Draft the accusation or statement of issues for the license action with the investigative report as the basis for this document.
- [150] c. Submit the draft license action and the investigative report, along with necessary evidence, to the Assistant Attorney General for review and critique.
- [150] d. Determine whether a license action will be heard with or without Attorney General participation after consultation with the Director and the Assistant Attorney General. If without, the Investigator and/or the Director will represent the Commission at the hearing.
- [150] e. Prepare the final copy of the license action document.
- [150] f. Serve the license action on the licensee(s) and copy to the Commission:
(1) complete the affidavit of service;
(2) provide notice of defense.
- [180] (a) If a notice of defense is not filed with the Commission within the specified fifteen days, prepare for an uncontested hearing at the next Commission meeting.
- [180] (b) If a notice of defense is filed, copy the license action, with notice(s) of defense, to the appropriate Hearing Examiner.
- [180] (c) If an entry of appearance is filed at any time by an attorney, copy the complete file to the Assistant Attorney General who may decide to enter the case if not already involved.
- g. Provide required assistance to the Hearing Examiner and/or the Assistant Attorney General to arrange for and conduct the pre-hearing conference and hearing.

5. Commission meeting:

- a. After hearing, copy the proposed decision to all parties, to the Commissioners and to the Lieutenant Governor.
- b. Ensure that the adoption order is signed by the Chairman.

6. Post-meeting:

- a. Copy all parties with the adopted decision by certified mail. Include a reconsideration request form to the licensee if the decision was to suspend or revoke;
- b. Notify each complainant of complaint closure;
- c. Publish the decision results in the licensee's local newspaper thirty days after service of the adopted decision to the licensee (and counsel) if there has been no request for reconsideration granted by the Commission and/or appeal to the Superior Court.

7. Stop Orders:

a. When a stop order is needed, coordinate service with the Commission. The Commission will be given a brief explanation of the need for the subpoena; this will be a written statement so that all members receive the same information. The stop order may be served with approval of a majority of the Commission. Any Commissioner not contacted directly will be informed by telegram.

b. The Investigator will draft the stop order and have the Assistant Attorney General review it for completeness and propriety.

c. The stop order may be served by certified mail or in person by the Investigator. If in person, the Investigator will make sure that the subject(s) understand that it is a definite order from the Commission to stop the identified activity, and that to continue is a violation which could result in a further charge.

d. Following service, the Investigator will complete an affidavit of service.

e. If a notice of defense is filed, a copy of the stop order, with the investigative report of the circumstances, will be provided to the Attorney General's office as soon as possible to comply with the requirement that hearings be scheduled within thirty days.

f. If the subject continues to operate after service of the stop order, the Investigator will notify the Attorney General's office to enforce the order.

8. Subpoenae:

a. When a subpoena is needed, the Investigator will poll the Commission for approval. The Commission will be given a brief explanation of the need for the subpoena; this will be a written statement so that all members receive the same information. A majority of the Commission must approve service. Any Commissioner not contacted directly will be informed by telegram.

b. Service may be by mail or in person. An affidavit of service will be completed.

c. If the recipient of the subpoena does not comply, the Investigator will contact the Attorney General's office to request enforcement. The Investigator will provide any assistance that may be requested by the Assistant Attorney General.

Complaint Investigative Procedures

1. Complaint Receipt:

- a. The Complaints Clerk will, within two days of receipt:
 - (1) log in the complaint with assignment of a complaint number;
 - (2) establish a complaint file to include:
 - (a) a procedural checklist;
 - (b) a contact record sheet;
 - (3) forward the file to the Investigator.
- b. The Investigator will, within one to three days of receipt:
 - (1) assign priority and violation type classifications;
 - (2) list the licensees to be contacted for response to the complaint;
 - (3) initiate an investigative report as described in paragraph 2a.
 - (4) return the file to the Complaints Clerk to send ten-day letters.

c. The Complaints Clerk will send a ten-day letter to all identified licensees. The letter will include a copy of the complaint and copies of supporting documentation which are necessary to understand the complaint and which the licensee would not already have.

d. Respondents to receive ten-day letters for a surety claim will be the same as those for the parallel license complaint.

2. Complaint Evaluation:

a. For each complaint, the Investigator will initiate an investigative report. This report will serve as the basis for the decision to close or proceed to hearing. It will include information as to contacts, information sources, information and conclusions. At the start, this report will list the:

- (1) allegation(s) of the complainant;
- (2) violations that appear to be present;
- (3) evidence that supports the allegation(s);
- (4) probable outcome of the complaint.

b. The responses to ten-day letters should be received within thirty days of the complaint filing date. If a respondent fails to respond, a second, certified, notice of complaint will be sent. If the respondent still fails to respond, a subpoena will be served according to procedures in paragraph 8.

c. Upon receipt of the response(s) to the ten-day letter(s), the Investigator will reevaluate the complaint. Following this reevaluation, there will be a decision to close the complaint without action or to investigate further.

d. If the decision is to close, the Investigator will summarize the events of the complaint, without names, and specify the reason for closure. The summary will be included in the weekly report to the Director and in the Investigator's Report to the Commission at the next meeting. The investigative report will be completed with an explanation of the reasons for closure and will be included in the complaint file. The complaint file will then go to the Complaints Clerk for closure letters to be sent to the parties. The complaint is considered closed at this time unless new information or a Commission request cause it to be reopened.

e. An unqualified license applicant will not receive a ten-day letter. The case will go immediately to the statement of issues stage in paragraph 4. An investigative report as specified in paragraph 1c will be initiated.

3. Investigation: With the decision to investigate further, the investigative report draft to date will serve as the basis for the investigation.

a. A work plan will be written by the Investigator which will detail what work remains to be done to complete the investigation and when the various elements of that work will be accomplished.

(1) The work plan is due within forty-five days of the complaint date.

(2) The work plan will be reviewed by the Executive Director.

b. Interview witnesses.

c. Identify needed additional documentation and obtain it.

d. The investigative report will serve as a record of the investigation.

e. Record contacts and other work done on the complaint on the contact record sheet inside the complaint folder. The time taken for that particular entry will also be recorded.

f. The investigation will be completed within ninety days of complaint receipt. By that time, the Investigator will determine whether the complaint should be taken to hearing or closed. The procedures as outlined in paragraph 1f will be used whenever the complaint is to be closed without action.

4. Hearing: the Investigator will:

a. Complete the investigative report.

b. Draft the accusation or statement of issues for the license action. The investigative report will serve as the basis for this document.

c. Submit the draft license action to the Assistant Attorney General for review. The investigative report and supporting evidence will be provided to the Assistant Attorney General at the same time for this review.

d. Determine whether a license action will be heard with or without Attorney General participation after consultation with the Director and the Assistant Attorney General. If without, the Investigator and/or the Director will represent the Commission at the hearing.

e. Prepare the final copy of the license action document.

f. Serve the license action. Service can be in person or by certified mail to the last registered address of the licensee.

(1) Provide notice of defense.

(2) Complete the affidavit of service.

g. Notice of Defense:

(1) If a notice of defense is not filed with the Commission within the specified fifteen days, prepare for an uncontested hearing at the next

Commission meeting as specified in paragraph 4j.

(2) With a notice of defense:

(a) assign the case to a Hearing Examiner;

(b) copy the accusation/statement of issues, with notice(s) of defense, to the Hearing Examiner.

(c) copy the license action, with notice(s) of defense, the investigative report and full documentation, to the Assistant Attorney General if the case is to be heard with Attorney General participation.

(3) The Assistant Attorney General will be informed of each instance where an attorney files an entry of appearance and will have the option to enter any case where the Commission staff had previously intended to proceed alone. If the Assistant Attorney General decides to enter the case, copy the entire file to the Attorney General's office.

h. Copy the served accusation/statement of issues to the Commission.

i. Provide whatever assistance is required by either the Hearing Examiner or the Assistant Attorney General to arrange for and conduct the pre-hearing conference and hearing.

5. Commission meeting:

a. Upon receipt of the proposed decision after hearing, provide copies to the parties, all Commissioners and to the Lieutenant Governor.

b. Once decided, ensure that the adoption order is signed by the Chairman.

c. Provide copies of the closed complaint summaries for review by the Commission.

d. An uncontested hearing will have neither a Hearing Examiner nor an Assistant Attorney General present. The Investigator will present the case to the Commission at the meeting as if the matter were contested. Each Commissioner will be provided with a full copy of the investigative report and evidence that supports the accusation or statement of issues.

6. Post-meeting:

a. Copy all parties with the adopted decision in the license action by certified mail. Include a reconsideration request form to the respondent if the decision was to revoke, suspend or deny.

b. Notify each complainant of complaint closure.

c. Publish the decision in the licensee's local newspaper on three successive weekends thirty days after service of the adopted decision to the respondent (and counsel) if there has been no granted reconsideration request by the Commission and/or appeal to the Superior Court. Publication can be immediate in uncontested cases.

7. Stop Orders:

a. When a stop order is needed, the Investigator will poll the Commission for approval. The Commission will be given a brief explanation of the

need for the stop order; this will be a written statement so that all members receive the same information. A majority of the Commission must approve service. Any Commissioner not contacted directly will be informed by telegram.

b. The Investigator will draft the stop order and take it to the Attorney General's office for review. The Investigator will also ask the coordinating Assistant Attorney General to review enforcement procedures available should the subject(s) of the stop order refuse to abide by it.

c. The stop order may be served by certified mail or in person by the Investigator. Upon service of the stop order, the Investigator will make sure that the subject(s) understand that it is a definite order from the Commission to stop the identified activity, and that to continue is a violation which could result in a further charge.

d. An affidavit of service will be completed.

e. A copy of the stop order, with supporting documentation and the investigative report, will be provided to the Attorney General's office if a notice of defense is filed. This will be done as soon as possible after receipt to comply with the requirement that hearings in such matters be scheduled within thirty days.

f. If the subject continues to operate without licensure after service of the stop order, the Investigator will notify the Attorney General's office to enforce the order.

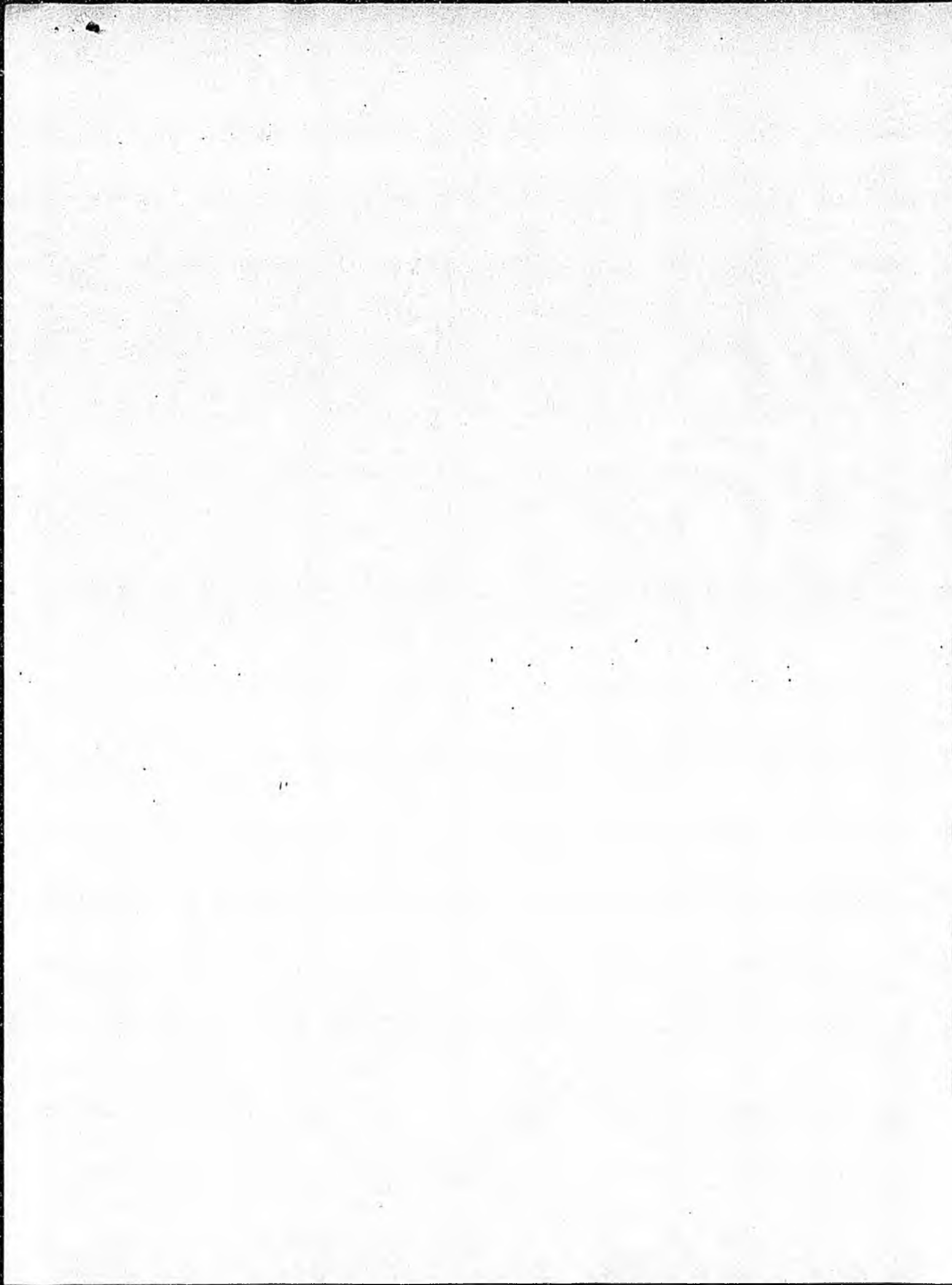
8. Subpoena:

a. When a subpoena is needed, the Investigator will poll the Commission for approval. The Commission will be given a brief explanation of the need for the subpoena; this will be a written statement so that all members receive the same information. A majority of the Commission must approve service. Any Commissioner not contacted directly will be informed by telegram.

b. Service may be by mail or in person. An Affidavit of Service will be completed.

c. If the recipient of the subpoena does not comply, the Investigator will contact the Attorney General's office by memorandum to request enforcement. The Investigator will provide any assistance that may be requested by the Assistant Attorney General.

0007K/8 Mk IV 102985



Offered: 4/29/85
Referred: Finance

Original sponsor: Clocksin

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
2 CS FOR HOUSE BILL NO. 232 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FOURTEENTH LEGISLATURE - FIRST SESSION
5 A BILL
6 For an Act entitled: "An Act relating to real estate claims based on
7 innocent misrepresentation; and claims against the
8 real estate surety fund."
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:
10 * Section 1. AS 08.88 is amended by adding a new section to read:
11 Sec. 08.88.395. INNOCENT MISREPRESENTATION. A person licensed
12 under this chapter is not liable to another person for innocent mis-
13 representations of fact.
14 * Sec. 2. AS 08.88.460(a) is amended to read:
15 (a) A person seeking reimbursement for a loss suffered in a
16 transaction as a result of fraud, negligent or intentional misrepre-
17 sentation, deceit, or the conversion of trust funds on the part of a
18 real estate broker, associate real estate broker, or real estate
19 salesman licensed under this chapter shall make a claim to the commis-
20 sion for reimbursement on a form furnished by the commission. The
21 form shall be executed under penalty of perjury, and information
22 required to be supplied shall include the following:
23 (1) the name and address of the real estate broker, associ-
24 ate real estate broker, or real estate salesman;
25 (2) the amount of the alleged loss;
26 (3) the date or period of time during which the alleged
27 loss occurred;
28 (4) the date upon which the alleged loss was discovered;
29 (5) the name and address of the claimant; or

1 (6) the general statement of facts relative to the claim-
2 ant.

3 * Sec. 3. AS 08.88.460(d) is amended to read:

4 (d) A claimant under this section shall pay a filing fee of \$25
5 [\$250] to the commission at the time the claim is filed. The filing
6 fee shall be refunded only if

7 (1) the commission makes an award to the claimant from the
8 real estate surety fund; or

9 (2) [THE CLAIM IS DISMISSED UNDER (c) OF THIS SECTION; OR

10 (3)] the claim is withdrawn by the claimant before the
11 commission holds a hearing on the claim.

12 * Sec. 4. AS 08.88.465(d) is amended to read:

13 (d) The claimant bears the burden of proof of establishing that
14 the claimant suffered losses in a transaction as a result of fraud,
15 negligent or intentional misrepresentation, deceit, or the conversion
16 of trust funds on the part of a real estate broker, associate real
17 estate broker, or real estate salesman and the extent of those losses.
18 All facts shall be established by a preponderance of the evidence.

19 * Sec. 5. AS 08.88.474 is amended to read:

20 Sec. 08.88.474. PAYMENT OF [SMALL CLAIMS] JUDGMENT. If a
21 [CLAIM ORIGINALLY FILED WITH THE COMMISSION IS DISMISSED AND IS HEARD
22 AS A SMALL CLAIMS ACTION UNDER AS 08.88.460(c) AND THE] claimant
23 prevails in a court [THE SMALL CLAIMS] action against a [THE] real
24 estate broker, associate real estate broker, or salesman, and the
25 action was based on conduct substantially similar to that set out in
26 AS 08.88.460(a), the commission shall make an award from the fund of
27 any outstanding portion of the [SMALL CLAIMS] judgment. The commis-
28 sion shall make the award after [ON] receipt of a copy of the final
29 judgment and an affidavit from the claimant stating that more than 30

1 days have elapsed since the judgment became final and that the broker,
2 associate broker, or salesman has not satisfied the judgment during
3 that time. After payment of a [SMALL CLAIMS] judgment the commission
4 is subrogated to the claimant's rights in the judgment under AS 08.-
5 88.490.

6 * Sec. 6. Section 1 of this Act applies to causes of action arising on
7 or after the effective date of this Act.

8 * Sec. 7. Sections 2 - 5 of this Act do not apply to a claim that a
9 real estate broker, associate real estate broker, or real estate salesman
10 has elected to remove to small claims court under AS 08.88.460(c) before
11 the effective date of this Act.

12 * Sec. 8. The commission shall refund \$225 of the filing fee paid under
13 AS 08.88.460(d) to a claimant whose case is pending on the effective date
14 of this Act.

15 * Sec. 9. AS 08.88.460(c) and 08.88.465(f) are repealed.

Introduced: 2/25/85
Referred: Labor & Commerce,
Judiciary and Finance

1 IN THE HOUSE

BY CLOCKSIN

2

HOUSE BILL NO. 232

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to claims against the real estate
7 surety fund."

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

9 * Section 1. AS 08.88.460(a) is amended to read:

10 (a) A person seeking reimbursement for a loss suffered in a
11 transaction as a result of fraud, innocent, negligent or intentional
12 misrepresentation, deceit, or the conversion of trust funds on the
13 part of a real estate broker, associate real estate broker, or real
14 estate salesman licensed under this chapter shall make a claim to the
15 commission for reimbursement on a form furnished by the commission.
16 The form shall be executed under penalty of perjury, and information
17 required to be supplied shall include the following:

18 (1) the name and address of the real estate broker,
19 associate real estate broker, or real estate salesman;

20 (2) the amount of the alleged loss;

21 (3) the date or period of time during which the alleged
22 loss occurred;

23 (4) the date upon which the alleged loss was discovered;

24 (5) the name and address of the claimant; or

25 (6) the general statement of facts relative to the
26 claimant.

27 * Sec. 2. AS 08.88.460(d) is amended to read:

28 (d) A claimant under this section shall pay a filing fee of \$25
29 [\$250] to the commission at the time the claim is filed. The filing

1 fee shall be refunded only if

2 (1) the commission makes an award to the claimant from the
3 real estate surety fund; or

4 (2) [THE CLAIM IS DISMISSED UNDER (c) OF THIS SECTION; OR

5 (3)] the claim is withdrawn by the claimant before the
6 commission holds a hearing on the claim.

7 * Sec. 3. AS 08.88.465(d) is amended to read:

8 (d) The claimant bears the burden of proof of establishing that
9 the claimant suffered losses in a transaction as a result of fraud,
10 innocent, negligent or intentional misrepresentation, deceit, or the
11 conversion of trust funds on the part of a real estate broker,
12 associate real estate broker, or real estate salesman and the extent
13 of those losses. All facts shall be established by a preponderance of
14 the evidence.

15 * Sec. 4. AS 08.88.474 is amended to read:

16 Sec. 08.88.474. PAYMENT OF [SMALL CLAIMS] JUDGMENT. If a
17 [CLAIM ORIGINALLY FILED WITH THE COMMISSION IS DISMISSED AND IS HEARD
18 AS A SMALL CLAIMS ACTION UNDER AS 08.88.460(c) AND THE] claimant
19 prevails in a court [THE SMALL CLAIMS] action against a [THE] real
20 estate broker, associate real estate broker, or salesman, and the
21 action was based on conduct substantially similar to that set out in
22 AS 08.88.460(a), the commission shall make an award from the fund of
23 any outstanding portion of the [SMALL CLAIMS] judgment. The
24 commission shall make the award after [ON] receipt of a copy of the
25 final judgment and an affidavit from the claimant stating that more
26 than 30 days have elapsed since the judgment became final and that the
27 broker, associate broker, or salesman has not satisfied the judgment
28 during that time. After payment of a [SMALL CLAIMS] judgment the
29 commission is subrogated to the claimant's rights in the judgment

1 under AS 08.88.490.

2 * Sec. 5. This Act does not apply to a claim that a real estate broker,
3 associate real estate broker, or real estate salesman has elected to remove
4 to small claims court under AS 08.88.460(c) before the effective date of
5 this Act.

6 * Sec. 6. The commission shall refund \$225 of the filing fee paid under
7 AS 08.88.460(d) to a claimant whose case is pending on the effective date
8 of this Act.

9 * Sec. 7. AS 08.88.460(c) and 08.88.465(f) are repealed.