
HB
2372

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

H. Judiciary	4/10/85	1:30 pm
" "	4/12/85	1:30 pm
" "	4/22/85	1:30 pm
" "	4/26/85	1:30 pm

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)

[X] replace with CS for HB 232 (Cmte) [ ] same title [X] new title

and recommends it do pass

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

Robin Taylor

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

Withdrawn

Amendment to HB 232

Add a new section to the bill as follows:

Sec. —

AS 08.88.— is added to read as follows:

AS 08.88.— Innocent misrepresentation. No cause of action shall lie against any person licensed under this act for innocent misrepresentation.

Comment: This reverses the holding in Bevins v Ballard, 655 P2d 757 (Alaska 1982) and State v Johnston, 682 P2d 383 (Alaska 1984).

Original sponsor: Clocksin

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 232 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

Sec. 08.88.395. INNOCENT MISREPRESENTATION. A person licensed under this chapter is not liable to another person for innocent misrepresentations of fact.

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

(a) A person seeking reimbursement for a loss suffered in a transaction as a result of fraud, <u>negligent or intentional</u> 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.

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

(d) A claimant under this section shall pay a filing fee of $25 [$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; or

(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.

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

(d) The claimant bears the burden of proof of establishing that the claimant suffered losses in a transaction as a result of fraud, negligent or intentional 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.

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

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 a court [THE SMALL CLAIMS] action against a [THE] real estate broker, associate real estate broker, or salesman, and the action was based on conduct substantially similar to that set out in AS 08.88.460(a), the commission shall make an award from the fund of any outstanding portion of the [SMALL CLAIMS] judgment. The commission shall make the award after [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.

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

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

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

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

HB 232 File Contents

March 13, 1985

1) Bill Summary -- Legislative Reporting Service

2) Overview -- Roger Poppe, Committee Staff

3) Overview and Sectional Analysis -- Memo from Rep. Clocksin to Rep. Navarre, March 4, 1985

4) Questions and Answers regarding Surety Fund -- Memo from J. Ellis to Rep. Clocksin -- February 22, 1985

5) Chapter 150 Session Laws of 1984

6) State v. Johnston -- Supreme Court of Alaska, May 4, 1984, Pacific Reporter, pp. 382-387

7) Letter to Real Estate Clients -- W. Richard Fossey -- August 9, 1984

8) Various materials relating to SCS for CS HB 705 (L & C) am S (which became Chapter 150 of the Session Laws of 1984)

   a) Written Comments of Elizabeth Johnson in opposition to HB 705 to House L & C Chair John Cowdery (April 9, 1984).

   b) Testimony for the record on HB 705 by Gary Wilken -- April 24, 1984 before the House Labor & Commerce Committee

   c) Memo from James Magowan to Commissioner Lyon re: Minutes of Hearing of Real Estate Commission on HB 705 and SB 537 April 26, 1984.

   d) Written Comments from Frank Austin to Barbara Hill, Chairperson of the Alaska Real Estate Commission - April 5, 1984

9) Fiscal Note -- Dept. of Commerce & ED; Real Estate Commission

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 232

Title: An Act relating to claims against the real estate surety fund

Sponsor: Clocksin

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 L. 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 deterrant 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

REALTOR®

ALASKA ASSOCIATION OF REALTORS®
3301 Denali Street, Suite 200 • Anchorage, Alaska 99503
Telephone 907-276-0655

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
1985 President

BLC/dd

M E M O R A N D U M

TO: All Members, House Labor and Commerce Committee

FROM: Roger Poppe, Committee Staff

DATE: March 14, 1985

SUBJECT: Overview, HB 232

On March 14 at 1:15 pm the House Labor and Commerce Committee met in Room 102 of the Capitol Building on HB 232 by Clocksin: Relating to the Real Estate Surety Fund:

Last session, there were bills in the House and the Senate dealing with this issue: HB 705 and SB 537, which were introduced in the separate houses by the respective Labor and Commerce Committees. HB 705 with numerous amendments, became law as Chapter 150 SLA 1984 (see your file).

The HB 232 before the Committee is an attempt to make some further adjustments in that legislation from last year, and sponsor Clocksin has both a sectional analysis and a succinct overview that cover the issues succinctly (see file -- Memo from Clocksin to Navarre March 4, 85).

Also included in your file is some of the written testimony from last year on HB 705 in either House Labor and Commerce Committee Hearings or else the related Real Estate Commission Hearings; many of the points covered in this bill are raised as issues and concerns by various parties in testimony last year.

James McGowan, head of the Real Estate Commission, will be testifying on this bill from the Anchorage LIO. Additionally, several representatives of the real estate industry in Anchorage and Juneau are expected to testify in opposition to the legislation. The Committee may also wish to refer to some comments by W. Richard Fossey to real estate clients, in which he points out several ways in which last year's legislation is not advantageous to the real estate industry.

M E M O R A N D U M

TO: Representative Mike Navarre DATE: March 4, 1985

FROM: Representative Don Clocksin SUBJECT: HB 232 - Real Estate Surety Fund

This memo is to request action on HB 232 relating to the Real Estate Surety Fund.

The Fund is established in AS 08.88.450 - .500 to provide a source of funds to reimburse consumers who have been "taken" by real estate licensees. Prior to 1984, the Fund consisted of fees paid by real estate licensees.

Last year the Legislature, over my objection, 1) imposed a $250 fee before consumers could file a complaint; and 2) allowed a real estate licensees to force the consumer to file a lawsuit rather than an administrative proceeding; and 3) equalized licensee fees. Chapter 150, SLA 1984 (copy attached).

The result has been a larger than necessary fund, the reduction of fees of real estate brokers, and the discouragement of consumer complaints. As of last month, only four complaints had been filed since October, 1984, when the new law went into effect! Broker fees dropped from $125 to $80 and the Fund contained over $630,000 - $130,000 over the statutory maximum.

In addition, in 1984 the Alaska Supreme Court ruled that a consumer could not recover from the Real Estate Surety Fund for innocent misrepresentations. State of Alaska v. Johnston, 682 P.2d 383 (Alaska 1984). (copy attached).

House Bill 232 seeks to reverse portions of the legislation from last year and correct the unfairness to consumers caused by the Johnston decision.

Sections one and three of the bill would expand the law to allow recovery from the fund for innocent and negligent misrepresentation.

Section two of the bill reduces the filing fee from $250 to $25.

Section four allows a consumer who obtains a court judgment against a real estate licensee to collect that judgment from the Fund. Current law only allows that remedy for small claims court actions which the real estate licensee forced the consumer to file.

Section five leaves unchanged those court cases already removed under last year's law.

Section six provides for a refund of the excess filing fee in pending cases.

Section seven repeals the provision forcing a consumer into court - .460(c) - and a conforming section - .465 (f).

Thank you for your attention to this bill.

DC:blg

Attachments:
- Chapter 150, SLA 1984
- State v. Johnston
- Memo from J. Ellis

M E M O R A N D U M

TO: Representative Don Clocksin DATE: February 22, 1985

FROM: J. Ellis SUBJECT: Answers to your questions regarding the Real Estate Surety Fund

I spoke with Jim McGowan, Executive Director of the Real Estate Commission and he answered the following questions:

1. Why was salesman fee ($40) repealed last year? It wasn't. Salesmen paid $40 while brokers paid $125. The Commission saw no actuarial basis for different fees. They look at annual expenses and divided them by the number of licenses issued to determine and set a standard fee of $80 for everyone. Fees were equalized. They believe this will greatly reduce administrative overhead.

2. How many surety fund complaints have been filed since October 1, 1984? Four.

3. Is the fund sound? "Yes, incredibly sound".

   How much is in it? $630,000 as of October '84, $130,000 over the Caps.

   What is the revenue each year? Approximately $240,00, with approximately 1,000 new licensees per year.

   What claims are pending against the fund and what is the backlog? Nov. 1: 200-300 case backlog. The Commission hired 2 half-time hearing officers to work on the backlog.

   Approximately 1000 claims remain and are affected by the Supreme Court decision.

   $100 - 150,000 in claims to be paid.

4. What is time taken to process claims?

   - the average time widely varies.
   - in the past; 1 to 2 years.
   - currently, 6-7 months - as quickly as they can get people together and process the paper.
   - their goal is 4 months from receipt to hearing.

JE:blg

HB 237

Chapter 150

AN ACT

Relating to the real estate surety fund.

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* 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. <u>The real estate surety fund is established</u> [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 <u>is</u> [SHALL BE] composed of payments made by licensed real estate brokers and salesmen under

AS 08.88.455 and filing fees retained in accordance with AS 08.88.4[illegible]. 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.

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

(a) A licensed real estate broker, [OR] 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 [BOND] fee not to exceed $125 [. AND A LICENSED 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 $62]. After the fund reaches $250,000 the commission shall by regulation adjust the surety fund [BOND] fees so that, taking into account anticipated expenditures for claims against the fund and real estate educational purposes, the fund is maintained at a level not less than $250,000.

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

(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 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 filin[illegible] to the commission at the time the claim is filed. Th[illegible] shall be refunded only if

(1) the commission makes an award to the claim[illegible] real estate surety fund;

(2) the claim is dismissed under (c) of this sec[illegible]

(3) the claim is withdrawn by the claimant [illegible] commission holds a hearing on the claim.

* Sec. 5. AS 08.88.465 is amended by adding a new subsecti[illegible]

(f) The provisions of this section do not apply to [illegible] is dismissed under AS 08.88.460(c).

* Sec. 6. AS 08.88 is amended by adding a new section to re[illegible]

Sec. 08.88.474. PAYMENT OF SMALL CLAIMS JUDGMENT. [illegible] originally filed with the commission is dismissed and is [illegible] small claims action under AS 08.88.460(c) and the claimant [illegible] the small claims action against the real estate broker, as[illegible] estate broker, or salesman, the commission shall make an[illegible] the fund of any outstanding portion of the small claims [illegible] receipt of a copy of the final judgment and an affidav[illegible] claimant stating that more than 30 days have elapsed sinc[illegible] ment became final and that the broker, associate broker, [illegible] has not satisfied the judgment during that time. After p[illegible] small claims judgment the commission is subrogated to the[illegible] 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 "permanent" replacement 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 F.2d 892, 895 (10th Cir.1980), *quoting White v. Harrigan*, 77 Okl. 123, 186 P. 224, 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 (Okl.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).

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.

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 NLRA may lack the legal capacity to offer permanent employment to such replacements. *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., *Hamming 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 *Hamming* 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.

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 federal labor law does not preclude "otherwise actionable" misrepresentation suits. — U.S. at —, 103 S.Ct. 3172 at 3178, 77 L.Ed.2d 798, 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*.

STATE of Alaska, REAL ESTATE COMMISSION, Appellant,

v.

Myrna JOHNSTON and Eva Loken, Appellees.

No. 7826.

Supreme Court of Alaska.

May 4, 1984.

Purchasers of real estate who had scinded earnest money agreement fi claim with Real Estate Commission for imbursement of earnest money from R Estate Surety Fund, alleging that brok had misrepresented boundaries of proper The hearing officer concluded that broke misrepresentation was innocent, but t Fund provided recovery for such misrep sentations and recommended that Fund imburse purchasers' deposit. Commiss adopted decision and awarded depo amount, and brokers appealed. The Su rior Court, Third Judicial District, Anch age, Milton Souter, J., reversed award, a Commission appealed. The Supreme Co held that Real Estate Surety Fund does provide reimbursement to claimants for nocent misrepresentations made by m bers of real estate profession.

Affirmed.

1. Brokers ⇐4

Real Estate Surety Fund does not p vide reimbursement to claimants for in

cent misrepresentations made by members of real estate profession. AS 08.88.450–08.88.500, 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 appellant.

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

Lewis Gordon, Baily & 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 transactions, 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 recission agreement which provided that the earnest money would be returned. Johnston, however, on the advice of Area Realtors' attorney, never executed the recission 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. 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 MISREPRESENTATIONS 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(a) 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 inten-

1. AS 08.88.450-500.

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:
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> (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 [sic?]
>
> (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.

tional-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 similarly 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(a)] 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-

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).

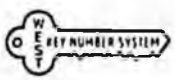
4. In *State v. Alex*, 646 P.2d 203, 209 n. 4 (Alaska 1982), we held that the plainer the statute's language, the more convincing contrary legislative history must be. *See also City of Homer v. Gangl*, 650 P.2d 396, 400 n. 4 (Alaska 1982); *see gen. North Slope Borough v. Sohio Petroleum Corp.*, 585 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 the term "misrepresentation" as that is employed in AS 08.88.460(a). In ing this conclusion we have carefull sidered each of the state's argument taining to legislative history, policy erations, and textual analysis and found none of them persuasive.[5] Th affirm the superior court's construct AS 08.88.460(a) and (b).[6]

AFFIRMED.

MATTHEWS, J., not participating.



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 *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982), this court first recognized a cause of action against a real estate broker for innocent misrepresentation.

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

other elements of a fraudulent misrepentation claim have been demonstrated. One additional aspect of Bubbel's misrepentation claim requires discussion: Bubcontends that Wien misrepresented its al capacity to hire him as a permanent ployee.[10] Specifically, Bubbel argues t because Wien had the benefit of house nsel and outside attorneys, Wien knew t it had a unilateral right under the lway Labor Act, and under federal es, to renege on its promised "permany" of employment. Bubbel reasons that so far as Wien did not apprise him of t limitation on his permanent status, en misrepresented the permanency of position.

Bubbel's argument on this theory is a row one: he does not dispute that when ired him, Wien had the legal capacity to e permanent replacement employees.[11] bbel concedes that Wien was not legally iged to accept the settlement agreement posed by the Presidential Emergency ard. Wien could have rejected the proed settlement, defied the strikers, and tinued to operate with its replacement ts. Instead, Wien voluntarily chose to ept the settlement and furlough its recement employees. This branch of Bub's misrepresentation theory, then, turns ely on Wien's failure to inform its "per-

manent" replacement 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 F.2d 892, 895 (10th Cir.1980), *quoting White v. Harrigan*, 77 Okl. 123, 186 P. 224, 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 (Okl.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).

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....

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 NLRA may lack the legal capacity to offer permanent employment to such replacements. *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., *Hamming 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 *Hamming* 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 ques-on, and the limited treatment it received the briefing of this case, we decline to lopt a flat rule that misrepresentations of w are not actionable in this state. In-ead, we hold, on the basis of this record, nly that Wien did not misrepresent its ring capacity.

[10, 11] Central to our decision on this oint is the character of the alleged misrep-esentation. Wien did not tell Bubbel any-ing false, it merely failed to inform him the legal consequences of something hich might happen (i.e.: that Wien could ossibly settle the ALPA strike).[13] There no evidence in the record suggesting that Vien anticipated such a settlement with e striking pilots at the time it hired Bub-el. On the contrary, the record reflects Vien's intention to keep the replacement lots in their jobs even after the strike nded. Moreover, as the holding in *Belk-ap* reflects, Wien's right to voluntarily reach its individual employment contracts as not absolute: the subsequent collective argaining agreement does not relieve Vien of liability for breach of inconsistent ndividual contracts. In such circumstanc-, the appropriate remedy for Wien's reach of its commitment to keep the re-lacements is a suit for breach of contract, ather than for misrepresentation of Vien's capacity to enter into such con-racts.[14]

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

For the reasons set forth above, the dgment of the superior court is RE-ERSED and this case is REMANDED for urther proceedings consistent with this pinion.

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 federal labor law does not preclude "otherwise actionable" misrepresentation suits. — U.S. — at —, 103 S.Ct. 3172 at 3178, 77 L.Ed.2d 798 at 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 of *Belknap*.

STATE of Alaska, REAL ESTATE COMMISSION, Appellant,

v.

Myrna JOHNSTON and Eva Loken, Appellees.

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Affirmed.

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cent misrepresentations made by members of real estate profession. AS 08.88.450–08.88.500, 08.88.460.

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OPINION

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On October 14, 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.

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1. AS 08.88.450-500.

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

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(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.

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[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]

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[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-

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[4] In short, we hold that innocent misrepresentations are not within the ambit of the term "misrepresentation" as that term is employed in AS 08.88.460(a). In reaching this conclusion we have carefully considered each of the state's arguments pertaining to legislative history, policy considerations, and textual analysis and have found none of them persuasive.[5] Thus we affirm the superior court's construction of AS 08.88.460(a) and (b).[6]

AFFIRMED.

MATTHEWS, J., not participating.

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 *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982), this court first recognized a cause of action against a real estate broker for innocent misrepresentation.

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

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DAVID T. ALTENBERN
CHRIS D. GRONNING

August 9, 1984

Dear Real Estate Clients:

During the last Legislative session, the Alaska Legislature amended the Real Estate Surety Fund statute. The changes in the law are significant.

First, under the new law, the Real Estate Commission has the option of considering a Surety Fund hearing to be a hearing on the suspension of a licensee's real estate license. If a Surety Fund claimant receives an award from the surety fund after a hearing, the Commission may suspend the license of a broker, associate broker, or real estate salesman until the licensee repays the surety fund award plus the cost of the Surety Fund hearing.

Second, if a Real Estate Surety Fund claim is less than $2,000, the real estate licensee now has the option of requiring the claimant to bring a small claims action in District Court rather than proceed through the Surety Fund hearing process. It is not clear from the statute whether a broker could elect to convert the small claims action to a court action under the Rules of Civil Procedure.

Third, the new law requires a Real Estate Surety Fund claimant to pay a filing fee of $250. This fee will only be refunded if the claimant wins an award from the Surety Fund, the claim is dismissed prior to a hearing, or the claim is transferred from the Real Estate Commission to the District Court as a small claims action.

On the whole, we believe this is a bad piece of legislation for real estate licensees. Under the new law, a real estate licensee faces the prospect of having his license suspended if there is a Surety Fund award against him unless he makes arrangements to pay the award. Thus, it is no longer true that a Real Estate Surety Fund claim is a claim against the Surety Fund and not the licensee. The Commission now has the option of requiring the licensee to pay the award as a condition of keeping his license.

The new law gives a broker the option for forcing the

claimant to bring a small claims action if the claim is $2,000 or less. This provision merely encourages a claimant to increase the amount of his claim to more than $2,000 if he wants to avoid proceeding through the courts. Moreover, it is unclear under the new law whether a small claims judgment for a Real Estate Surety Fund claimant could lead to a license suspension. If that is the case, then a real estate licensee's license could be suspended by the Real Estate Commission after an informal small claims hearing by a district court judge. Since the district judges are often plaintiff oriented in small claims proceedings, electing the small claims procedures could be risky business for a real estate licensee.

The only good feature of this new legislation is the $250 filing fee. This fee may discourage the patently frivilous Real Estate Surety Fund claims that are currently being filed by claimants.

As you know, the Real Estate Surety Fund statutes have caused real estate licensees nothing but trouble since the law was changed in 1980 to allow the real estate commission to pay claims from the fund without requiring claimants to proceed through the courts. Since 1980, the Surety Fund statutes have been changed twice, both times to the detriment of real estate licensees. In 1982, the law was changed to require, in certain circumstances, a real estate licensee to pay the cost of Real Estate Surety Fund hearings if an award is made against him.

To summarize, under the new Real Estate Surety Fund statutes, the Real Estate Commission may treat a Real Estate Surety Fund claim hearing as a license suspension proceeding. If an award is made against a real estate licensee, the Commission has the option of suspending the licensee's license until the licensee agrees to pay the Surety Fund award plus the cost of the hearing under terms that are acceptable to the Real Estate Commission. Thus, a real estate licensee must take every Real Estate Surety Fund claim seriously because an adverse result could lead to suspension of the licensee's license.

In our view, the Real Estate Surety Fund statutes as presently enacted are an unnecessary burden to the real estate industry. Real estate licensees are forced to defend minor and sometimes frivilous claims at great expense. The recent statutory amendments make a bad situation worse because a Surety Fund hearing may lead to suspension of a licensee's real estate license.

We have said again and again that the Real Estate Surety Fund statutes must be repealed. We have drafted legislation requiring Real Estate Surety Fund claimants to go to court and get a judgment against a real estate licensee before applying to the Real Estate Commission for payment from the Real Estate Surety Fund. To the best of our knowledge, Alaska is the only state that allows Surety Fund claims to be processed by hearing

officers rather than requiring claimants to proceed through the courts. It is vital that the real estate industry get this law amended. Until the law is changed, real estate licensees are going to be spending alot of time and money defending Real Estate Surety Fund claims before Real Estate Commission hearing officers.

If you have any questions on this matter, please do not hesitate to contact me.

Very truly yours,

BANKSTON & McCOLLUM

Richard Fossey

W. Richard Fossey

WRF:dr
Encl.

Section 1. Application for payment out of fund of damages remaining unpaid upon judgment against licensee for fraud, etc; maximum liability per transaction.

(a) When any aggrieved person obtains a final judgment in any court of competent jurisdiction against any person or persons licensed under A.S. 08.88, under grounds of intentional fraud or or intentional conversion of trust funds arising directly out of any transaction when the judgment debtor was licensed and performed acts for which a license is required under A.S. 08.88, the aggrieved person may, upon the judgment becoming final, file a verified application in the court in which the judgment was entered for an order directing payment out of the Real Estate Surety Fund of the amount of actual and direct loss in the transaction up to the sum of ten thousand dollars ($10,000) of the amount unpaid upon the judgment; provided that nothing shall be construed to obligate that separate account for more than ten thousand dollars ($10,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in the transaction.

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

Section 1. Time for action by court on application for payment; required showing of person aggrieved.

The court shall conduct a hearing upon such application 30 days after service of the application upon the Real Estate Commission. Upon petition of the Real Estate Commission, the court shall continue the hearing up to 60 days further; and upon a showing of good cause may continue the hearing for such further period as the court deems appropriate. At the hearing the aggrieved person shall be required to show:

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

(b) He has complied with all requirements of this article.

(c) He has obtained a judgment as set out in Section 1, stating the amount thereof and the amount owing thereon at the date of the application.

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

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

amount realized.

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

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

Section 3. Order of Court; grounds; defense of actions; burden of proof; presumption; dismissals; compromise of claims.

Whenever the court proceeds upon an application as set forth in Section 2, it shall order payment out of the Real Estate Surety Fund only upon a determination that the aggrieved party has a valid cause of action within the purview of Section 1 has complied with the provisions of Section 2.

The commission may defend any such action on behalf of the Real Estate Surety Fund and shall have recourse to all appropriate means of defense and review, including examination of witnesses and the right to re-litigate any issues, material and relevant in the proceeding against the Real Estate Surety Fund, which were determined in the underlying action on which the judgment in favor of the applicant was based. If the judgment in favor of the applicant was by default, stipulation, or consent, or whenever the action against the licensee was defended by a trustee in bankruptcy, the applicant shall have the burden of proving that the cause of action against the licensee was for fraud, intentional misrepresentation, deceit, or conversion of trust funds. Otherwise, the judgment shall create a rebuttable presumption of the fraud, intentional misrepresentation, deceit, or conversion of trust funds by the licensee, which presumption shall affect the burden of producing evidence.

The commissioner may move the court at any time to dismiss the application when it appears there are no triable issues and the petition is without merit. The motion may be supported by affidavit of any person or persons having knowledge of the facts,

and may be made on the basis that the petition, and the judgment referred to therein, does not form the basis for a meritorious recovery claim within the purview of Section 1; provided, however, that the commissioner shall give written notice at least 10 days before such motion.

The commissioner may, subject to court approval, compromise a claim based upon the application of an aggrieved party. He shall not be bound by any prior compromise or stipulation of the judgment debtor.

Section 4. Defense of actions; conclusive adjudication of issues.

The judgment debtor may defend an action against the Real Estate Surety Fund on his or her own behalf and shall have recourse to all appropriate means of defense and review, including examination of witnesses. All matters, excluding the issues of fraud, intentional misrepresentation, deceit or conversion of trust funds, which are finally adjudicated in the underlying action are conclusive as to the judgment debtor and the applicant in the proceeding against the Real Estate Surety Fund.

Section 5. Order directing payment out of fund; limitation of liability.

If the court finds after the hearing that the claim should be levied against the portion of the Real Estate Surety Fund allocated for the purpose of carrying out the provisions of this chapter, the court shall enter an order directed to the commissioner requiring payment from the Real Estate Surety Fund whatever sum it shall find to be payable upon the claim pursuant to the provisions of and in accordance with the limitations contained in this chapter.

Notwithstanding any other provision of this chapter, the liability of the Real Estate Surety Fund for th purposes of this chapter shall not exceed twenty thousand dollars ($20,000) for any one licensee for which the cause of action occurred.

Section 6. Liability of fund insufficient to pay claims; distribution of monies; ratio; joinder.

If the amount of liability of the Real Estate Surety Fund, as provided for in Section 5, is insufficient to pay in full the valid claims of all aggrieved persons by whom claims have been filed against any one licensee, such amount shall be distributed among them in the ratio that their respective claims bear to the aggregate of such valid claims, or in such other manner as the court deems equitable. Distribution of such monies shall be among the persons entitled to share therein, without regard to the order of priority in which their respective judgment may have been obtained or their claims have been filed. Upon petition of the Real Estate Surety Fund, the court may require all claimants and prospective claimants against one licensee to be joined in one action, to the end that the respective rights of all such claimants to the separate account in the Real Estate Surety Fund for education, research, and recovery purposes may be equitably adjudicated and settled.

Section 7. Insufficient money in fund to pay claims; priority of payment when sufficient sums deposited; interest.

If, at any time, the money deposited in the Real Estate Surety Fund is insufficient to satisfy any duly authorized claim or portion thereof, the commissioner shall, when sufficient money has been deposited in the Real Estate Surety Fund, satisfy such unpaid claims or portions thereof, in the order that such claims or portions thereof were originally filed, plus accumulated interest at the rate of ten and one-half percent per annum.

Section 8. Subrogation.

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

Section 9. Effect of chapter upon disciplinary proceedings. Nothing contained herein shall limit the authority of the commissioner to take disciplinary action against any licensee for a violation of any of the provisions of A.S. 08.88 or the regulations promulgated by the commission, nor shall the repayment in full of all obligations to the Real Estate Surety Fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought against the provisions of A.S. 08.88.

Elizabeth I. Johnson
Counsellor and Attorney at Law

540 "L" Street Suite 304
Anchorage, Alaska 99501
(907) 277-3025

April 9, 1984

Representative John Cowdery, Chairperson
House Labor and Commerce Committee
Alaska State Legislature
Pouch B
Juneau, Alaska 99811

RE: House Bill 705, Senate Bill 537
Relating to the Real Estate Surety Fund

Dear Representative Cowdery:

Enclosed please find a summary of my oral testimony before the House Labor and Commerce Committee last Tuesday. I understand that the Bill was passed out of the Committee unanimously.

As you will recall I am adamantly opposed to not only the concept of House Bill 705 but to specific provisions. I am sending copies of this letter to other legislators in the hope that they will review the legislation more carefully.

I thank you for the opportunity to testify but believe there has been inadequate public comment on this bill and that it deserves more attention from both the House and Senate.

Sincerely,

Elizabeth I. Johnson

EIJ/kkr

Letters to the editor

Real estate sales legislation

Dear Editor:

As a former public member of the Alaska Real Estate Commission (1976-82), I am concerned about changes being proposed to the laws governing the Real Estate Surety Fund.

On April 3, the House Labor Committee held a teleconference hearing on HB-705, "an act relating to the real estate surety fund." This bill will make substantial changes to the process used to reimburst individuals who are damaged monetarily in a real estate sales transaction when a licensee is involved.

The bill will also change the law so that an individual will only be able to claim damages if the loss is due to intentional misrepresentation. At present the licensee is held responsible even if the misrepresentation is unintentional.

Also, an individual will have to get a judgment in court before a claim against the surety fund can be filed. At present an administrative hearing is required. These are major changes to the law that should have a great deal of public discussion before they are enacted.

I was surprised and then shocked by the action of the House Labor Committee on this bill. It was introduced by the committee on March 26. Eight days later the committee held a teleconference hearing and at the end of the hearing passed the bill from the committee. I understand that it was a unanimous do-pass by the members of the committee present.

Other than the testimony by Elizabeth Johnson, an attorney who has conducted many of the administrative hearings on surety fund claims, the most distinguishing feature of the hearing was what I would describe as the committee's lack of understanding of the bill. I think this will be supported by the report of the hearing if one is prepared.

During the hearing several of the committee members asked that those testifying provide them with written comments so stand the relations between the comments and the bill. Their action in passing the bill out of the committee with a do-pass recommendation makes these requests ludicrous.

Why was the bill moved so fast? The following is my guess. The language in the bill was developed by the Alaska Association of Realtors. I understand that it was first presented to the state Real Estate Commission for consideration at its last meeting.

I was also told by a current public member on the commission that the commission decided to study the proposal and determine what action it would take on the proposal at the next meeting. This is not an unusual action for the commission.

The proposal next surfaced as HB-705 and a companion bill in the Senate. However before this happened the state Realtors association held its annual cocktail party for legislators in Juneau.

I have seen no problem with the Labor Committee's introduction of HB-705. I also see no problem with the legislators attending the Realtors' annual cocktail party. Realtors are constituents and deserve no less. However, I am shocked that a bill with such potential impact on the public would be moved from the committee with so little regard for public input.

The record will show that of the persons in attendance at the teleconference hearing (persons attended at Fairbanks, Homer and Anchorage), less that 10 percent were not real estate licensees. The hearing was scheduled so fast that it was not even listed on the weekly list of hearings mailed out by the Legislative Affairs office.

Why is the association so interested in getting HB-705 passed? Testimony at the hearing indicated that they think that the surety fund is paying out too many claims under the present system. A comparison was made between the claims paid by the California fund and our fund to emphasize this. They feel that the hearing office is responsible for this.

This is also ludicrous since the hearing office presents findings to the commission (five real estate brokers and two public members) who can adopt, change or reject the findings. Also, so far less than 30 percent of the claims filed against the fund have been paid. The present process gets the job done in less than six months. If HB-705 passes the process will go back to the civil courts and have to compete with other matters on the court calender.

These proposed changes have the potential of affecting every person who buys or sells real estate in Alaska. It should have much more public discussion. I would also suggest that it is important enough for the state real estate commission to hold a special meeting to hold a public hearing on the changes.

Frank Austin
3839 Apollo Drive

WRITTEN COMMENTS
REGARDING HOUSE BILL 705 AND SENATE BILL 537
RELATING TO THE REAL ESTATE SURETY FUND

Since 1980 a fund created by the Alaska Real Estate Commission has allowed payment up to $10,000.00 per transaction to consumers who have suffered financial loss because of a real estate licensee's action that involved fraud, deceit, misrepresentation, or conversion of trust funds. The fund is maintained by payment of a yearly surety fee not to exceed $125.00 for each licensee. After the fund reaches $250,000.00 the Real Estate Commission adjusts the fees so that the fund is maintained at a level not less than $250,000.00.

Prior to 1980 persons making a claim against the fund had to first secure a court judgment against the licensee. In 1980 after Sunset review of the legislation, the requirement of a judgment was dropped and the Real Estate Commission set up a procedure whereby complainants could make a claim directly against the fund.

Once a complaint is received an administrative hearing is held. The hearing consists of presentations by the claimant and the licensee or licensees. The Administrative Hearing Officer has the power to subpoena evidence including documents and to require the attendance of witnesses. Both parties are allowed counsel if they so choose.

At the conclusion of the hearing, Findings of Fact and Conclusions of Law are entered with a recommendation to the Real Estate Commission on whether the claim should be paid.

It should be noted that once a Hearing Officer has made a recommended decision the Real Estate Commission reviews the case and decides whether the claim should be paid. After the final decision, the licensee still has the option to appeal to the Superior Court.

Attached is a summary of the claims paid since the inception of the administrative proceedings in 1980.

House Bill No. 705 and Senate Bill No. 537 substantially amend the current procedure to again require that members of the public obtain a judgment against the licensee prior to making a claim against the fund. The legislation then requires a second hearing by the court to determine that the judgment creditor has no other assets available and that payment from the fund is proper. The proposed legislation also restricts the type of claims which are paid from the fund.

(d) Page 2, lines 12-14 -- specifically prohibits payment on claims for innocent misrepresentation.

Section 3, page 2, AS 08.88.465 requires a second hearing after entry of a judgment and before amount is paid from Surety Fund.

(a) Page 2, lines 20 and 21 -- requirement of hearing within 30 days is virtually impossible to enforce administratively with the current backlog in the court system.

(b)(4) Page 3, lines 4-6 -- What is a "reasonable attempt"? Open to judicial interpretation and "mini trial" on attempt to find judgment creditor and determine assets.

(b)(5) Page 3 -- requires a separate court hearing on whether creditor has been able to locate assets and has taken the "necessary action" to apply the assets to the judgment. What is "necessary action"?

(b)(6) Page 3, lines 13-16 -- requires the court to make an independent determination that the claimant has "diligently pursued other remedies." What is meant by this phrase? Requires a separate showing that there is no other person that could be liable in the transaction -- in other words the claimant could obtain a judgment against licensee A and during the hearing under this section, a different judge could conclude that licensee B is responsible and deny payment from the fund. This is a peculiar provision which could result in contradictory findings by judges with regard to the same transaction, thereby allowing licensees to shift responsibility and avoid payment from the fund.

Section 4 AS 08.88.470 repealed and reenacted:

(a) Page 3, lines 17-21 -- requires a separate court hearing and in effect a "mini trial" on the validity of the claim.

(b) Page 3, lines 22-27 -- requires the claimant to prove his case twice. Note that if the action was defended by a Trustee in Bankruptcy there has to be an entirely new hearing, although many times there will have already been a complete trial in Bankruptcy Court.

Section 7 AS 08.88.475(b):

(b) Page 4, lines 16-20 -- there is no definition of "transaction." This section appears to read that no matter how many people are involved nor how much money is lost, if the licensee can claim that there was only one "transaction" then the $10,000.00 limit applies. For example, in the case of the sale of shares in a limited partnership, if the licensee makes fraudulent sales to 50 people, obtains $5,000.00 from each, and takes the money, is this construed as "one transaction" where the $10,000.00 limit would apply?

Comments:

Suggestion for changes in current statute and administrative proceedings.

Some of the primary complaints I've heard about the Surety Fund can be solved easily within the context of the present procedure administered by the Real Estate Commission by making changes to the current statute.

1. Elimination of "frivolous" claims. Some licensees have complained that they are burdened with responding to "frivolous" claims which are then denied. It has been my experience that there are very few "frivolous" claims. Many claims are settled or withdrawn prior to hearing or during the hearing process. If there is a problem with inadequate initial screening of complaints, I would suggest the following:

a. Establish a mandatory filing fee of perhaps $50.00 to discourage those persons who feel the fund is a source of free money.

b. Allow the staff of the Real Estate Commission to do an initial screening of the complaint. If the complaint is not recommended for an administrative hearing and the claimant wishes to go forward, they must post a bond of $250.00 to secure payment of hearing cost and partial attorney's fees to the licensee if the claim is denied.

2. Denial of Due Process -- there have been some feelings by claimants that because they are not entitled to a jury trial, the administrative proceeding denies them due process. No administrative proceeding provides for a jury trial and as a practical matter all the rights and privileges accorded in a court hearing are preserved in the administrative procedure process. The only exception is the relaxed standard for the rules of evidence. . This has not been a significant problem in any case I have handled, in which either an attorney appeared or in which licensees represented themselves.

If this is perceived as a problem, the current statute can be amended to provide for de novo review by the Superior Court as is done in school employment cases.

3. Allowance of claims based on innocent or negligent misrepresentation. Some of the most vociferous opposition to the Surety Fund has been to claims which have been allowed on the basis of innocent or negligent misrepresentation. This theory of recovery is consistent with the holdings of the Alaska Supreme Court. Thus, licensees are going to continue to be held responsible for mistakes which are innocently made regardless of the status of the Surety Fund.

In short, with the above-noted exceptions, the Surety Fund works well in protecting the public interest and insuring that licensees receive a fair hearing. In addition, the administration of the Surety Fund over the past three years has caused the industry to "self police" to a great degree. The problems with the fund can be more readily addressed by amending the current procedure than requiring consumers to prosecute claims through civil court.

9. Surety Claim Recovery:

Hoey, Thomas	Recovery complete.	1,000
Congdon, Renwick	Recovery complete 030383.	1,139
Lankford, Daniel	Billed 011883, no response.	
McCormick, Gail	Recovery complete 052683.	11,275
Motonaga, Gary	Recovery complete.	4,225
Calvo, Tony	Claim repaid; hearing costs unpaid.	10,000
Odell, Mina	Claimant paid, hearing costs unpaid.	1,000
McCourt, James	Billed 830718; no response.	
Jones, Jerry	Claimant paid, hearing costs unpaid.	800
Ruszkowski, Alvin	Claimant paid, hearing costs unpaid.	1,000
Rink, Robert	Claimant paid, hearing costs unpaid.	1,000
		31,429

10. Surety claims statistics:

	Fiscal Year			Calender Year		
	Filed		Paid	Filed		Paid
1981	31	0		52	3	$ 11,943
1982	70	13	$ 41,853	93	18	62,612
1983	99	20	80,346	123	14	67,644
1984	97	3	30,000	29	1	10,000
Totals to date	297	36	$152,199*	297	36	$152,199*

* This amount includes paid claims that have since been recovered from the licencees, and therefore differs from the total that is stated on the Surety Claim Case summary and as shown below.

Surety claim totals:	Numbers of claims		Dollar amounts of claims	
Paid, unrecovered	37	12.5%	$ 124,974.24	8.1%
Paid, recovered	*	*	29,025.00	1.9%
PD-Approved	3	1.0%	18,012.00	1.2%
Denied	69	23.2%	317,898.97	20.5%
PD-Denied	1	0.3%	11,000.00	0.7%
Withdrawn	30	10.1%	134,878.25	8.5%
In process	157	52.9%	901,657.39	58.2%
Total filed	297	100.0%	$1,547,945.85	100.0%

Decided claims:	Numbers of claims		Dollar amounts of claims	
Paid, unrecovered	37	26.4%	$124,974.24	19.3%
Paid, recovered	*	*	29,025.00	4.5%
PD-Approved	3	2.1%	18,012.00	2.8%
Denied	69	49.4%	317,898.97	50.8%
PD-Denied	1	0.7%	11,000.00	1.7%
Withdrawn	30	21.4%	134,878.25	20.9%
Total decided claims	140	100.0%	$646,288.46	100.0%

* These numbers are included in the paid, unrecovered, category because there is overlap where the hearing costs are outstanding after repayment of the claim.

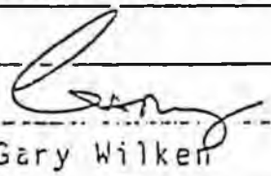
Mrs. Barb Hill

Please accept the attached letter as my testimony for the public hearing regarding HB 705.

I respectfully request that the testimony be read into the record

Thanks for the opportunity to participate.

Sincerely yours,



Gary Wilken

24 APR 84

JOR

April 24, 1984

TO: Alaska Real Estate Commission

RE: Testimony: HB 705 and SB 537

For. Record

Regarding the existing surety fund structure, I have had the opportunity to read both the State Association's position paper and the corresponding pending legislation to which this testimony is addressed.

My first concern is the broad brush method by which the legislation would apply to the existing Surety Fund. One does not, when one's automobile requries a tune-up, replace the entire engine. Instead, one performs the required adjustments to continue on. The analogy appears to be very appropriate to HB 705 in regard to the Surety Fund. The legislation would replace the heart of the system when indeed only a tune-up is required.

I am sympathetic to the Association's concerns and claims of frivolous and/or vindictive claims being filed against licensed real estate agents. I believe this to be a legitimate concern and one that must be addressed. When the current Surety Fund system was formulated in 1979-1980, the experience of a significant number of less than valid claims was not fully anticipated.

The concept of a filing fee is a step in the right direction for remedy. The suggestion that it be $50 to $100 is good, however, in my opinion the amount is not sufficient. I am in favor of a filing fee of some greater amount, perhaps $250-$500, a portion of which is refundable if the plaintiff prevails in his argument. As we have seen, there must be some consideration on the part of the plaintiff as to their liability in filing a claim against the Surety Fund. If a plaintiff understands from the outset that a substantial fee is required to file, and that if unsuccessful, the fee is considered a cost of litigation, the vast majority of those people now filing frivolous or vindictive claims will be markedly reduced.

This concept emodies two factors. First, the plaintiff understands that there will be a filing fee that will not be refundable, let us say $100 out of the deposit. Secondly, the plaintiff must consider the remaining amount to be a "gamble", if you will, that he will prevail. In brief, the large filing policy requires some serious economic forethought on the part of the complaintant.

My second concern centers around the numerous references to innocent misrepresentation which appears to exclude such action from the protection of the Fund. I think back to the lady in Wasilla that, upon closing a deal for her new country residential acreage, discovered that when it came time to build, half of her property was over a cliff and she had purchased a wonderful set of mud flats. The agent had flagged the corners incorrectly. He did not mean to. He really believed he was selling her the correctly staked land and told her so. He did not do his job properly and consequently, the lady's property was worth one-half of what she paid for it.

I recall the family in Juneau that purchased a previously occupied house with the assurance from the selling agent that the foundation was high and dry. Reality surfaced when a high tide increased the water level to the point it flooded the basement and created a difficult problem with the potential rotting of the supporting members. The agent had represented the house to be free of flooding problems and he really believed it was because he did not do his job as well as he should have: he never inspected the crawl space and the supports for existing water damage and potential of same.

Should the lady in Wasilla or the family in Juneau suffer economic hardships on what could well be the biggest financial transaction of their lives because two agents did not do their job as completely as they should have? I do not believe so. The agent or the industry, must provide a vehicle to make these two people whole and a reasonable accessable Surety Fund is that vehicle. The buyers in these instances, are the last people that should suffer due to what would be termed innocent misrepresentation.

Thirdly, it has been suggested a small claims court action may be utliized to resolve a dispute. While this may appear on the surface to be viable, even with the existing $2000 limit or with an increase thereof, one who has worked within the small claims system knows that a simple checkmark in the proper box on the defendants reply form turns a small claims proceeding into a full district court case. Thus the benefits of the small claims system are easily lost.

In summary, it is my opinion the proposed changes are a backward step in the protection of the public from damage incurred in a real estate transaction. The judgement method, used prior to the existing Surety Fund method has proven itself to be totally ineffective from both a time and money standpoint in dealing with alleged wrongs on the part of real estate agents. It is difficult to consider returning to that system as a means to remedy the current ills of the Surety fund.

Thursday, March 29, 1984
Page D Section D

Panel submits real estate bill to end simplified surety fund rule

by Annette Taylor
Times Business Writer

The House Labor and Commerce Committee this week introduced a bill that would require victims of shoddy real estate transactions to win their case in court before tapping the surety fund for compensation.

The Alaska Association of Realtors proposed the legislation to rectify the current system in which members believe they are exposed to double jeopardy.

Under the current system, victims of fraud, deceit or misrepresentation by licensed agents can be awarded surety fund claims — for which the realty is billed — and then can sue the agents in court.

In surety fund claims, the procedure involves both parties presenting their case before a hearings officer, who then makes a recommendation to the Alaska Real Estate Commission. The maximum award is $10,000.

Real estate agents want the procedure changed back to the way it was before 1990, when people had to go to court before having access to the surety fund. The 1990 legislature simplified the procedure to save people the time and expense of going through the court system.

The proposed legislation also would require people who have won their court cases to exhaust all remedies for getting their money back from the guilty agents or brokers before being allowed to tap the fund.

Real estate agents said the current system penalizes all licensed agents who pay into the fund rather than focusing on the wrong-doer. Although the real estate commission bills the guilty agents, there is no legal mechanism to ensure payments, agents said.

The surety fund is a special account set up by the legislature to reimburse people who have been defrauded or misled by licensed agents in real estate transactions.

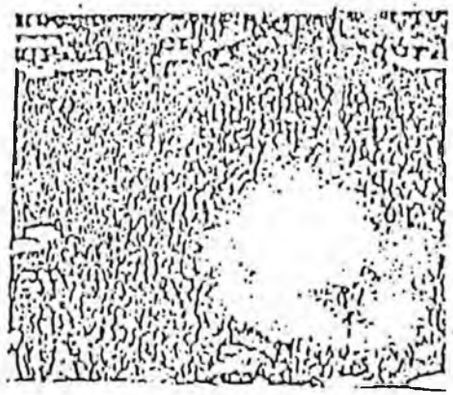
Agents pay up to $125 into the fund in lieu of obtaining private bonds. The amount they pay is based on how much money is in the fund. The fund cannot exceed $500,000, half of which is designated for education.

Campbell to switch from tin to plastic

Associated Press

Camden, N.J. — The Campbell Soup can will be replaced by a plastic con- [illegible] to consumer prefer-

own cans in 1954, has become the third largest manufacturer in the business, turning out about 4 billion tin cans in 1983 — behind American Can Co. and



MEMORANDUM State of Alaska

-23-

TO: Richard A. Lyon
Commissioner
Dept. of Commerce and
Economic Dev.

DATE: April 26, 1984

FILE NO:

TELEPHONE NO:

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

SUBJECT: Real Estate Commission
Hearing on HB 705 &
SB 537

The commission held a public meeting on April 24 in Anchorage. The meeting was scheduled from 2 to 5 P.M. and from 7 to 10 P.M. There were 20 to 40 people in attendance most of the time. We estimate 50 to 70 members of the public, at least, attended the meeting.

Licensees were there in greater numbers than non-licensees, however, both licensed and unlicensed members of the public attended in significant numbers.

Public testimony ran until after 9:00 P.M.

After the testimony was heard, it was the definite opinion of the commission that important issues and questions have been raised by both licensees and non-licensees. Many of these are not adequately dealt with under the current statute and must be addressed.

The commission determined that these concerns are also not adequately resolved by the current bills (HB 705 - SB 537).

It was, therefore, the commission's decision that it does not support the passage of HB 705 or its companion, SB 537. The commission hopes that it will be given the chance to work with the industry and the public to come up with recommendations for legislation that it can support, legislation that will resolve the existing problems without introducing new problems of at least equal concern.

It is the commission's intention to have alternate legislative recommendations ready for the next session.

This is a high priority with the commission.

The commission has asked that copies of its minutes of the meeting and its decision be passed on to Chairman John G. Fuller, House Rules Committee, Chairman Richard A. Eliason, Senate Labor and Commerce Committee and Carol Derfner, Special Assistant, Boards and Commissions. These copies are attached.

Attachments

JLM/cw/0702C50

DRAFT/April 26, 1984

ALASKA REAL ESTATE COMMISSION

April 24, 1984

Anchorage, Alaska

Call to Order

By authority of AS 08.88.051, and in accordance with AS 44.62, the Alaska Real Estate Commission was called to order by Vice Chairman Ribacchi at 2:10 on 24th of April 1984. He welcomed the presence of visitors and called the meeting to order as a public hearing.

Vice Chairman Ribacchi acknowledged the absence of Chairman Hill due to the illness of her father, Earl Silberer, a former commissioner, and one of the originators of the real estate commission as well as a long time practitioner in the real estate industry. Vice Chairman Ribacchi stated that the purpose of the public hearing was to obtain a feel from the public as well as the industry regarding two bills that have been introduced into the Legislature, HB 705 and SB 537. These bills would significantly amend the current procedure in filing a claim against the surety fund. The following commissioners were in attendance:

Dave Ribacchi, Vice Chairman, Broker-At-Large
Karen Morris, Broker
John Benson, Broker
LaVerne Collins, Public Member
Gil Serrano, Broker

Absent:

Ed Anders, Public Member
Chairman Hill, Broker

Commission staff present:

James L. Magowan, Executive Director
Joseph P. Koss, Investigator/Auditor
Lois B. Waugh, License Examiner

Before proceeding, Commissioner Ribacchi asked each of the commissioners if they would like to make a comment. At this particular time, none of the commissioners wished to make a comment. Commissioner Ribacchi then asked for the public to present testimony regarding the bills.

S. B. Medford

Mr. Medford stated that he was opposed to SB 705 and HB 537. Mr. Medford stated that the general public do not have access to unlimited funds. These bills, if enacted, would require hiring an attorney and going through a court process which could take up to six years before the case would be settled. The practical effect would be to deprive the claimant of ready access to justice. Mr. Medford suggested that the commission, if they decided to approve the present legislation, increase the surety fund from $10,000 to a $100,000 limit and that the commission strengthen their position in order to obtain more evidence and that more funds be appropriated to the investigative staff.

Commissioner Morris read a letter for the record which is addressed to Commissioner Hill from Gary Wilken, former Chairman, Commissioner and Public Member. (Letter attached to the minutes.)

Commissioner Collins read a letter for the record which is from the Department of Law, Norman Gorsuch, Attorney General. (Letter attached to the minutes.)

Janet Mischler, Claimant

Ms. Mischler spoke against changing the surety fund procedures. She related to the commission her past history in which she was injured monetarily in a real estate transaction. Her first step was to go through the courts. She incurred $8,000 in indebtedness to an attorney and has spent over $20,000 on the problem, which is still not corrected. Her land is deemed unsellable. She stated that she would support a filing fee for the surety fund and that she believed that the surety fund and the commission were there to assist the public.

George Oliver, Associate Broker

Mr. Oliver, Associate Broker since 1974, asked the commission to support the two legislative bills before the house and the senate. He asked the commission to make a bold decision in favor of the legislation which would give a clear message to the Governor and the Administration that there should be a change in the surety fund procedures. He stated that the commission was not equipped to handle the number of surety claims before them and that it had become a burden. He said that the majority of the Realtors were in favor of the present legislation because it is necessary to change the present surety fund procedures before the surety fund is depleted due to an overabundance of claims having been made.

Vice Chairman Ribacchi asked that there be a distinction made between a real estate licensee and the professional organization, REALTORS. Not all licensees are Realtors. Commissioner Ribacchi also stated that five of the members have served for less than six months, and that the majority may not be familiar with the history of the surety fund, and asked that the public look upon the commission as a new body with their own ideas.

Cary Vlahovich, President, Anchorage Board of Realtors

Mr. Vlahovich, President of the Anchorage Board of Realtors which has a membership of 1400, stated that the Realtors have a very strict Code of Ethics and these ethics are served by an arbitration board, which is open to the Realtors and individuals who have dealt with the Realtors to arbitrate any problems they may have. Mr. Vlahovich stated that the majority of the membership of the Anchorage Board of Realtors are discontented with the present surety fund and the hearing officer process. He stated that due process is not provided by the present procedure. It is believed by many Realtors that they not only face a surety fund hearing but will also face civil proceedings simultaneously, before or after surety fund hearing has concluded. The real estate licensees believe that the present system is not equitable. The state makes no effort in recovering the losses to the surety fund, therefore, the licensees have to bear the burden in fees to the surety fund to maintain its present state. The hearing officer's decisions are most dissatisfying. They do not provide a full check and balance system as well the participation of the commission, therefore, due process is not given to all involved in the surety fund process.

Maureen Kennedy, Alaska Public Interest Research Group (AKPIRG)

Ms. Kennedy spoke representing Alaska Public Interest Research Group (AKPIRG), which has a membership of 400. Ms. Kennedy is not in support of the present legislation. Ms. Kennedy stated the surety fund is effective self-policing of the industry. The present Common Law allows the consumer to argue for innocent representation. She believes that a $50.00 filing fee is adequate, that any amount above that, could cause unnecessary hardship for the consumer. Not only the consumer, but the licensees, should be concerned about going through the courts, because it would increase the cost to the consumer as well as to the licensee. If the surety fund does not bear the burden of the hearing officer procedure, then the courts would bear the burden of the costs which would also increase the cost to the State.

Julian Mason, Attorney

Julian Mason, representing the Alaska Association of Realtors and the Anchorage Board of Realtors, spoke supporting the proposed legislation. One of his main concerns is the damage to the licensee's reputation through adverse publicity. Mr. Mason stated that if the present surety fund system is not changed, the following things could happen:

1. The Bevins/Ballard decision from the Supreme Court establishes that the Real Estate licensee may now be held liable for in "innocent misrepresentation". The Supreme Court, in its decision, invites the Real Estate licensees' to include in listing agreements provisions which require the seller to indemnify the agents if claims are made against them. This is on page sixteen of the advance opinion. The result would be that the licensee would tender his defense to the seller, the seller will then sue the buyer. The seller would then use one form to bring all parties of the transaction together. He suggested that this would not be an easier system but one that would be made more difficult and time consuming.

2. Mr. Mason stated that the present surety fund system is bogged down by surety claims and will continue to be so because of the easy access to the fund.

3. The claimant will eventually bear the cost of the administrative time of the hearing officer procedure. This is now a trend in the State government.

In conclusion, Mr. Mason stated that time is not a problem in the court system, that it takes less time and is less costly than the present surety fund proceedings. The main positive reason for supporting the legislation is that it will provide a neutral forum to handle cases. It is a form by which one is not judged by one's peers or by a hearing officer who is hired by the commission which gives the appearance of unfairness. It is important to have an independent system to judicate claims against Realtors and that system is the judiciary. It is not the function of the real estate commission to compensate without finding fault.

David LeBlond, Assistant Attorney General

David LeBlond, Assistant Attorney General for the Department of Law spoke, responding to Mr. Mason's comments.

Mr. LeBlond urged the commission to inquire from staff as to what has been the record of the surety fund, what the current status of the fund is and how many claims have been paid. He suggested this due to comments made by previous speakers that the fund is possibly being depleted by paying out claims.

Mr. LeBlond addressed the notion that there is something fundamentally unfair about the surety fund process, that it denies due process and that the abjudicating official is biased. The commission and the commission's hearing officer are judges, in essence, of the surety fund claims. The hearing officers are not part of the proceedings, they are not one of the parties. There is a claimant and a respondant. The hearing officers are all licensed attorneys with at least two years experience in the practice of law in the State of the Alaska. The commission reviews and adopts the hearing officer's findings of fact pursuant to the Administrative Procedures Act. The APA is well established. It is not considered an unfair procedure.

The last point Mr. LeBlond wished to make was in regard to the liability of the licensee. He said this has been well established through the Bevins/Ballard case. Under common law the licensee is liable for innocent misrepresentation.

Bob Arwezon

Bob Arwezon, Realtor, an Associate Broker since 1967, spoke in favor of the present legislation. Mr. Arwezon wanted to inform the commission of HB 561 which would increase small claim limits from $2,000 to $5,000. Mr. Arwezon feels this would be an avenue to abjuidicate most real estate disputes in which the liability is $5,000 or less. Mr. Arwezon submitted a copy of an article which appeared in the Anchorage Times and was written by Annette Taylor. The title of the article is "State Opts Out of Trailer Owner Maker Suits". The essence of the article is that the proposed bill would allow

homeowners to bring suit in civil court on the bond itself whenever a dispute should arise in regards to a mobile home transaction.

Mr. Arwezon expressed concern about "double jeopardy" on the part of the real estate licensee. By "double jeopardy" he meant that a claim could be made against the surety fund and at the same time a civil law suit could be filed. He expressed concern that the licensee would be liable to pay a double amount. He said that there was dissatisfaction with the present surety system, that the original intent in 1974 had never been changed and that if the intent was to be changed, the legislature should readdress the fund as its intent for the fund. The surety fund was originally to act only in place of bonds to be an indemnity when a licensee was either bankrupt or out of state.

Julian Mason, Attorney

Julian Mason, representing the Alaska Association of Realtors and the Anchorage Board of Realtors again addressed the commission to clarify his statements in regard to the hearing officer's appearance of impropriety. He said that he was not saying the hearing officers showed unfairness but they appeared to the public as being unfair because they actually work with the real estate commission, of which five members are real estate licensees. Mr. Mason wanted to point out that the real estate commission is the only agency through which the Administrative Procedures Act actually awards damages. Mr. Mason also wanted to say that the hearing officer procedure through the APA does not meet the standards of the court system.

Joseph Dygess

Mr. Dygess, private citizen, spoke in opposition to the surety fund legislation. The purpose of the real estate commission is to perform a service for the public as well as for the licensee. Passage of the legislation would be de facto deregulation of the industry. The real estate commission must decide if it wants to regulate the industry and perform an abjudication service. If it does not wish to do so, then what is the merit of having a commission that is not performing a public service.

Frank Austin

Frank Austin, former Public Member of the Alaska Real Estate Commission, resident of the Anchorage area for twenty-five years, spoke in opposition to HB 705 and SB 537. Mr. Austin stated that he supported the written testimony by Elizabeth Johnson, Attorney-At-Law, submitted to the House Labor and Commerce Committee. Mr. Austin is not in support of the present legislation. He wished the commission to consider the following:

1. Is the surety fund serving the purpose for which it was originally intended?

2. What problems does the surety fund now have?

Mr. Austin said that less than 20% of the claimants claims are being paid. The present hearing officers do have the necessary experience. Their findings of fact are only recommendations to the commission. It is the commission that

makes the final decision. It is a process which can be appealed back to the commission and then on to the Superior Court if necessary. There has been a statement that the real estate commission does not have the experience and background to make a decision. These are the same peers that will judge a license action. The original intent of the fund was not for it to be an insurance policy. When a loss is due to the action on the part of the licensee, the fund is the proper form of redress. Mr. Austin proposed that the commission consider the establishment of a filing fee and also a method by which claims can be recovered and repaid to the fund. He suggested a $50 fee or 10% of claim fee, whichever is greater with a maximum $250 fee.

Ms. Johnson's letter, referred to by Mr. Austin, is to be attached to the minutes.

Charles Bauer

Mr. Bauer does not support the present legislation. Mr. Bauer had filed a claim, went through the surety fund hearing proceedings and was awarded $10,000. He believes the procedure is fair and just. He stated that without the fund he would have been unable to afford to sue. He would have simply lost $10,000.

Mary Anne Kaemerer

Ms. Kaemerer was a claimant. Ms. Kaemerer is not in support of the present legislation. Before filing a claim against the surety fund, Ms. Kaemerer went through the court system. She was awarded a judgement of $38,400.00 but as of today, she has not received any of the awarded money. Her attorney fees were $3,000 approximately. In December of 1981, she filed her claim to the surety fund and one year later, her claim was awarded in the amount of $10,000.00. She feels the system is fair and just.

David Leblonde, Assistant Attorney General

David LeBlond, Assistant Attorney General for the Department of Law spoke again. He said that the procedure is unlike the typical administrative procedure. It is a unique judicial proceeding in which private individuals are assembled and an award is made. The surety fund pays a claim based on findings of fact to which the law is applied by a hearing officer. He stated that because the hearing officer procedures are not identical to the court system doesn't mean that they are unfair in any aspect. In order to receive reimbursement from the licensees whose claims have been paid to a claimant, the commission must go to court for a judgement against the licensee. The court requires additional formality. The court will not just "rubber stamp" the commission's decision. That does not mean that the commission's decision was unfair and not equitable. The court will take into consideration all the facts and then make a decision as to a judgement being awarded back to the surety fund.

Jeff Kennedy

Mr. Kennedy, a resident of the State of Alaska, spoke stating he is not in favor of the present legislation. Mr. Kennedy believes the consumer

will have more problems collecting from a real estate licensee, that it will require more procedures to go through, which would be more costly to the consumer.

The public hearing was recessed at 5 P.M. for dinner.

The public hearing was reconvened by Vice Chairman Ribacchi at 7:00 P.M. Vice Chairman Ribacchi asked the commission if they were going to consider specific action in regard to HB 705 and the SB 537. It was decided unanimously that the commission would take a position before the evening ended.

All commissioners with the exception of Chairman Hill and Commissioner Ed Anders were in attendance.

Jacqueline Stoll

Jacqueline Stoll, a real estate licensee, a real estate claimant to the surety fund, spoke against the present legislation. Ms. Stoll believes the real estate surety fund should remain as is and that it is a good avenue to settle disputes. She would have been unable to recover her money from a licensee who was convicted and jailed, if the fund had not been available.

Kenneth Brown

Kenneth Brown, a broker for nine years, spoke in favor of the present legislation. Mr. Brown said there are several vehicles for the claimant to use as opposed to the surety fund. He said that there is a Professional Standards Committee of the Board of Realtors, an invidiual make go to a Small Claims Court or an individual make actually take his claim through other judicial courts.

Ruth Edmondson

Ruth Edmondson, Broker spoke in favor of the present legislation. Ms. Edmondson believes that there are relatively few "black sheep" in the industry and that most of the licensees are having to pay into the surety fund for these few "black sheep". She spoke of "cronyism" by the hearing officers and stated that she believes that the hearings are held in "star chamber" conditions.

Ellen R. Malapanes

Ellen R. Malapanes, an Associate Broker, spoke in favor of HB 705 and SB 537. She believes that the present surety fund system does not give "due process" and that the court system would be more equitable.

Ted Kosack

Ted Kosack, Anchorage resident, spoke not in favor of the present legislation. Mr. Kosack is now having a personal experience in which he, as an injured party, in regards to a condominium associaton. He believes that the surety fund is both fair to the consumer and the licensee.

Glenda Straube

Glenda Straube, representing the Fairbanks Board of Realtors, spoke in support of HB 705 and SB 537. She stated two points:

1. The present surety fund system lacks due process.

2. She stated that there is a lack of concern on the part of the Attorney General's Office, Department of Law, to collect from the guilty party. She further stated it is the perception of many that the surety fund is an easy fund to collect from.

Mark Korting

Mark Korting, a Broker since 1976, spoke in support of HB 705/SB 537. Mr. Korting stated that the intent of HB 705/SB 537, is not to eliminate the Consumer Protection aspect but to put it back into the Court System, where it originally was. Mr. Korting stated that the real estate industry is concerned about the consumer and, in many instances, tries to settle out-of-court. Mr. Korting indicated that the Realtor State membership consists of 1,958 members. The commission is noted that there are over 4,000 licensees in Alaska.

DeeAnn Gleason

DeeAnn Gleason, a Broker since 1975, spoke in support of HB 705/SB 537. She believes the present claims filed against the surety fund would not hold up in court. Ms. Gleason also believes that the commission does not have the experience nor willingness to process the surety claims and that the hearing officer proceeding is unfair.

Gene Bates

Gene Bates, a licensed real estate agent since 1972, presently an Associate Broker, spoke in favor of HB 705/SB 537. Mr. Bates spoke in regard to the licensee being subjected to "double jeopardy" and not recently "due process" from their peers.

Connie Sipe, Assistant Attorney General

Connie Sipe, Assistant Attorney General, Consumer Protection Division, Department of Law spoke against HB 705/SB 537. Ms. Sipe believes the real estate commission, if they supported HB 705/SB 537 would be effectively retreating from the consumer's interest. The public has put trust in the commission and the public respects the commission's professionalism. The public believes the commission is a leader of the state. There is a trend in the industry for arbitration and the commission has gone one step beyond arbitrating to paying claims. The commission is in the forfront, one of the leaders.

Ms. Sipe suggested that there may be a problem. Many real estate licensees may take a "back lash" by the problems created by contractors. She asked the real estate industry to support legislation that would tighten the licensing requirements for contractors. Ms. Sipe also stated

that the present courts, through Common Law, recognize innocent misrepresentation. Ms. Sipe stated that there are a number of reasons why one would not want to go through the court judicial system. All lawsuits are reported to the credit bureau and would be part of one's credit rating. Also, it is not easy to go through Small Claims. She believes that the present legislation retreats beyond the original bonds and last, but not least, she believes the public would not be impressed by the real estate commission making the surety fund more remote.

She believes that the present surety fund system does provide due process and that one is allowed the opportunity to appeal the decision if they wish. In most instances, when taking a case through the court system, it is judge tried, not jury tried. Ms. Sipe explained the "double jeopardy" in the language of law means "tried for the same crime twice", it does not apply in instances of civil court action where an individual may be sued by other parties dealing with the same case. An individual may choose whatever entity is available to them to abjudicate a civil court action.

Grayce Oakley

Grayce Oakley, Broker, who has been licensed since 1971, spoke representing the Anchorage Board of Realtors in support of HB 705/SB 537. Ms. Oakley said that today that many licensees would not take listings from contractors unless they are bonded and licensed by the regulatory agency. Many licensees believe that they are in "double jeopardy" because they have to defend themselves multiple times through the surety system as well as the courts. The burden of proof, when going through the surety system, is on the claimant. Ms. Oakley does not believe the licensees are given "due process", in effect, the hearing officer is both a judge and a jury. In the court system, a jury hears evidence directly. The benefits from HB 705/SB 537 would be that a judgement would go against the offender or person who has to pay and after it is proven that the individual cannot pay or they are uncollectable, then the claimant may tap the surety fund. In the present surety fund system, the hearing officer makes a proposed decision, forwards it on to the commission and, in essence, the commission authorizes a check to be paid. This is the prevailing view of the Alaska Association of Realtors. It is the belief that the commission does not have before it all the findings of fact and therefore, at times, cannot make a proper decision.

Elizabeth Johnson

Elizabeth Johnson, Attorney-At-Law, Hearing Officer, for the Alaska Real Estate Commission spoke against HB 705/SB 537. Ms. Johnson stated that there are problems with the surety fund but they can be addressed by amending the present statutes as opposed to completly "revamping" the surety fund as suggested in HB 705/SB 537. Ms. Johnson stated that the licensee, as well as the claimants, are given "due process" and that there is another example, in which claims are paid, claims which are larger than the surety fund. This is the Worker's Compensation Board, under the Administrative Procedures Act and worker compensation claims are paid, awarded to claimants. She stated that there is a problem in the backlash in regards to contractors, who are

perhaps at fault. There must be some way in which to make the contractor responsible. At the present time, there does not seem to be an effective way. She realizes the unhappiness of the industry in regard to the court's decision surety fund legislation will not eliminte the liability of the licensee for innocent misrepresentation.

Commissioner Ribacchi closed the meeting to public testimony. The meeting was recessed for five minutes.

The session reconvened. Vice Chairman Ribacchi stated that the commission, through the day, had procedurally been run informally, but now would be back in formal session, operating under its own commission procedures.

A motion was made by Commissioner Collins, and seconded by Commissioner Serrano, not to support the proposed legislation of AB 705 and SB 537.

The commission voted not to support the present legislation with one disenting vote.

Commissioner Ribacchi	Aye
Commissioner Collins	Aye
Commissioner Serrano	Aye
Commissioner Morris	Aye
Commissioner Benson	Nay

Commissioner Collins further stated that the commission has a new direction to address after hearing the public testimony but does not believe it is now the time to change the surety fund procedures.

Commissioner Serrano stated that he believes that the industry should look out for the consumer and that it is good public relations to do so. At the moment he is opposed to the present legislation since there are no other alternatives at this time, he would like to leave the surety fund proceedings "as is".

Commissioner Benson stated that he believes the bills are a step forward and there are benefits in it for the industry.

Commissioner Morris stated that it is the leaders of the industry that support and have promoted the present legislation, that they do not necessarily speak for all the licensees. She further stated that the surety fund needs some amendments but it is doing a good job in its present position.

Commissioner Ribacchi stated as an individual, that many things are "over regulated" and that more regulation is not always in the benefit of the industry or the public. He stated that there are some conflicts and discrepancies in the real estate statute and that it can be improved but at the present time the surety fund should remain in its present form.

After listing to testimony, Commissioner Ribacchi, feels that there are many misunderstandings of the commission's functions and that the commission should take into consideration how these misunderstandings can be reversed.

Vice Chairman Ribacchi asked that letters be sent to Commissioner Lyon and the Administration informing them of the commission's decision as well as to the Alaska Association of Realtors and soliciting suggestions for amendments and ways to revise the real estate surety fund.

It was decided by the commission that the next commission meeting would be held on May 24th and 25th instead of May 17th and 18th as previously announced.

Commissioner Collins asked the Realtors to prepare a supplement to the Phase I, White Paper and forward it to the commission for their review at the next commission meeting. She also asked if they would be willing to pursue other avenues of improvement of surety fund procedures.

It was moved by Commissioner Serrano, seconded and unanimously passed for the comission meeting to adjourn.

The meeting was ajourned.

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

RECEIVED
APR 26 1984
AK REAL ESTATE COMM.

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☐ 1031 W 4th AVENUE
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☐ 1st NATIONAL CENTER
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☐ POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 24, 1984

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

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

Dear Mr. Magowan:

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

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

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

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

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

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

Sincerely,

Norman C. Gorsuch
Attorney General

NCG:eer

cc: The Honorable Dick Elaison
Senator

The Honorable Jalmar Kerttula
President of the Senate

The Honorable Joe Hayes
Speaker of the House

Ray Gillespie
Special Staff Assistant
to the Governor

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

(22)

APRIL 5, 1984

Frank Austin
3839 Apollo Drive
Anchorage, AK 99504

MRS. BARBARA HILL, CHAIRPERSON
ALASKA REAL ESTATE COMMISSION
3601 C STREET
ANCHORAGE, ALASKA 99503

DEAR BARB,

I AM CONCERN AT THE PROCESS THAT HB-705 SEAMS TO BE FOLLOWING. THE RECENT HEARING BY THE HOUSE LABOR COMMITTEE WAS VERY DISTURBING IN THE LACK OF PUBLIC COMMENT THAT WAS OFFERED ON A BILL THAT WILL HAVE SUCH A POTENTAL EFFECT ON THE PUBLIC. I FEEL THAT IT IS THE RESPONSIBILITY OF THE COMMISSION TO SEE THAT THIS DOES NOT SET THE TONE FOR THE FINANCE COMMITTEE HEARINGS. TO ENSURE THAT THERE IS PUBLIC COMMENT ON THIS BILL I URGE YOU TO CALL A SPECIAL SESSION OF THE COMMISSION AT WHICH PUBLIC COMMENT ON HB-705 MIGHT BE OFFERED TO THE COMMISSION. I ALSO URGE THE COMMISSION TO REVIEW HB-705 AND FORWARD A POSITION ON THIS BILL TO THE FINANCE COMMITTEE.

I AM HAND DELIVERING THIS TO THE COMMISSION OFFICE FOR EXPIDITIOUS HANDLING. THANK YOU FOR ANY CONSIDERATION GIVEN TO MY REQUEST. I HAVE ALSO ATTACHED A COPY OF A LETTER TO THE EDITOR ON THE LABOR COMMITTEE HEARINGS AND MY CONCERNS ABOUT HB-705.

SINCERELY,

FRANK AUSTIN

ATTACHMENT

cc: Commission Members

APRIL 5, 1984

Frank Austin
3839 Apollo Drive
Anchorage, AK 99504

ANCHORAGE TIMES
LETTERS TO THE EDITOR
P.O. BOX 40
ANCHORAGE, AK 99510-0040

DEAR EDITOR,

PLEASE INCLUDE THE FOLLOWING IN YOUR LETTERS TO THE EDITOR COLUMN.

REAL ESTATE SALES LEGISLATION

AS A FORMER PUBLIC MEMBER OF THE STATE REAL ESTATE COMMISSION (1976-82) I AM CONCERNED ABOUT CHANGES THAT ARE BEING PROPOSED TO THE LAWS GOVERNING THE REAL ESTATE SURETY FUND.

ON TUESDAY APRIL 3RD THE HOUSE LABOR COMMITTEE HELD A TELECONFERENCE HEARING ON HB-705 "AN ACT RELALTING TO THE REAL ESTATE SURETY FUND". THIS BILL WILL MAKE SUBSTANTIAL CHANGES TO THE PROCESS USED TO REIMBURST INDIVIDUALS WHO ARE DAMAGE MONETARILY IN A REAL ESTATE SALES TRANSACTION WHEN A LICENSEE IS INVOLVED. THE BILL WILL ALSO CHANGES THE LAW SO THAT AN INDIVIDUAL WILL ONLY BE ABLE TO CLAIM DAMAGES IF THE LOSS IS DUE TO INTENTIONAL MISREPRESENTATION. AT PRESENT THE LICENSEE IS HELD RESPONSIBLE EVEN IF THE MISREPRESENTATION IS UNINTENTIONAL. ALSO, AN INDIVIDUAL WILL HAVE TO GET A JUDGEMENT IN COURT BEFORE A CLAIM AGAINST THE SURETY FUND CAN BE FILED. AT PRESENT AN ADMINISTRATIVE HEARING IS REQUIRED. THESE ARE MAJOR CHANGES TO THE LAW THAT SHOULD HAVE A GREAT DEAL OF PUBLIC DISCUSSION BEFORE THEY ARE ENACTED.

SPEAKING OF PUBLIC DISCUSSION. I WAS SUPRISED AND THEN SHOCKED BY THE ACTION OF THE HOUSE LABOR COMMITTEE ON THIS BILL. IT WAS INTRODUCED BY THE LABOR COMMITTEE ON MARCH 26TH. EIGHT DAYS LATER THEY HELD A TELECONFERENCE HEARING (APRIL 3ND) AND AT THE END OF THE HEARING PASSED THE BILL FROM THE COMMITTEE. I UNDERSTAND THAT IT WAS A UNANIMOUS DO PASS BY THE MEMBERS OF THE COMMITTEE PRESENT. OTHER THAN THE TESTIMONY BY MS. ELIZABETH JOHNSON, AN ATTORNY WHO HAS CONDUCTED MANY OF THE ADMINISTRATIVE HEARINGS ON SURETY FUND CLAIMS, THE MOST DISTINGUISHING FEATURE OF THE HEARING WAS WHAT I WOULD DESCRIBE AS THE COMMITTEES LACK OF UNDERSTANDING OF THE BILL. I THINK THIS WILL BE SUPPORTED BY THE REPORT OF THE HEARING IF ONE IS PREPARED. DURING THE HEARING SEVERAL OF THE COMMITTEE MEMBERS ASKED THAT THOSE TESTIFYING PROVIDE THEM WITH WRITTEN COMMENTS SO THAT THEY COULD BETTER UNDERSTAND THE RELATIONS BETWEEN THE COMMENTS AND THE BILL. THEIR ACTION IN PASSING THE BILL OUT OF THE COMMITTEE WITH A DO PASS RECOMMENDATION MAKES THESE REQUEST LUDICROUS.

WHY WAS THE BILL MOVED SO FAST? THE FOLLOWING IS MY GUESS. THE LANGUAGE IN THE BILL WAS DEVELOPED BY THE ALASKA ASSOCIATION OF REALTORS. I UNDERSTAND THAT IT WAS FIRST PRESENTED TO THE STATE REAL ESTATE COMMISSION FOR THEIR CONSIDERATION AT THEIR LAST MEETING. I WAS ALSO TOLD BY A CURRENT PUBLIC MEMBER ON THE COMMISSION THAT THE COMMISSION DECIDED TO STUDY THE PROPOSAL AND DETERMINE WHAT ACTION IT WOULD TAKE ON THE PROPOSAL AT THEIR NEXT MEETING. THIS IS NOT AN UNUSAL ACTION FOR THE COMMISSION. THE PROPOSAL NEXT SURFACED AS HB-705 AND A COMPANION BILL IN THE SENATE. HOWEVER BEFORE THIS HAPPENED THE STATE REALTORS ASSOCIATION HELD ITS ANNUAL COCKTAIL PARTY FOR LEGISLALTORS IN JUNEAU.

I HAVE SEE NO PROBLEM WITH THE LABOR COMMITTEE'S INTRODUCTION OF HB-705. I ALSO SEE NO PROBLEM WITH THE LEGISLATORS ATTENDING THE REALTORS ANNUAL COCKTAIL PARTY. REALTORS ARE CONSTITUENTS AND DESERVE NO LESS. HOWEVER, I AM SHOCKED THAT A BILL WITH SUCH POTENTIAL IMPACT ON THE PUBLIC WOULD BE MOVED FROM THE COMMITTEE WITH SO LITTLE REGARD FOR PUBLIC INPUT. IF THE RECORD IS CHECKED YOU WILL FIND THAT OF THE PERSONS IN ATTENDANCE AT THE TELECONFERENCE HEARING (PERSONS ATTENDED AT FAIRBANKS, HOMER AND ANCHORAGE) YOU WILL FIND THAT LESS THAT TEN PERCENT WERE PERSONS WERE NOT REAL ESTATE LICENSEES. THE HEARING WAS SCHEDULED SO FAST THAT IT WAS NOT EVEN LISTED ON THE WEEKLY LIST OF HEARINGS MAILED OUT BY THE LEGISLATIVE AFFAIRS OFFICE.

WHY IS THE ASSOCIATION SO INTERESTED IN GETTING HB-705 PASSED? TESTIMONY AT THE HEARING INDICATED THAT THEY THINK THAT THE SURETY FUND IS PAYING OUT TO MANY CLAIMS UNDER THE PRESENT SYSTEM. A COMPARISION WAS MADE BETWEEN THE CLAIMS PAID BY THE CALIFORNIA FUND AND OUR FUND TO EMPHASIS THIS. THEY FEEL THAT THE HEARING OFFICE IS RESPONSIBLE FOR THIS. THIS IS ALSO LUDICROUS SINCE THE HEARING OFFICE PRESENTS FINDINGS TO THE COMMISSION (FIVE REAL ESTATE BROKERS AND TWO PUBLIC MEMBERS) WHO CAN ADOPT, CHANGE OR REJECT THE FINDINGS. ALSO, SO FAR LESS THAN 30 PERCENT OF THE CLAIMS FILED AGAINST THE FUND HAVE BEEN PAID. THE PRESENT PROCESS GETS THE JOB DONE IN LESS THAN SIX MONTHS. IF HB-705 PASSES THE PROCESS WILL GO BACK TO THE CIVIL COURTS AN HAVE TO COMPETE WITH OTHER MATTERS ON THE COURT CALENDER.

THESE PROPOSED CHANGES HAVE THE POTENTIAL OF AFFECTING EVERY PERSON WHO BUYS OR SELL REAL ESTATE IN ALASKA. IT SHOULD HAVE MUCH MORE PUBLIC DISCUSSION. I WOULD ALSO SUGGEST THAT IT IS IMPORTANT ENOUGH FOR THE STATE REAL ESTATE COMMISSION TO HOLD A SPECIAL MEETING TO HOLD A PUBLIC HEARING ON THE CHANGES. I HAVE REQUESTED THAT THE CHAIRPERSON OF THE COMMISSION CALL A SPECIAL MEETING AND HOLD PUBLIC HEARINGS ON THIS MATTER.

Sincerely,

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