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December 17, 1981

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INTERAGENCY

Mr. Richard E. Wolfe, Director
Office of Manufactured Housing
1645 West Jefferson
Phoenix, Arizona 85007

Re: I81 - 135 (R81-152)

Dear Mr. Wolfe:

This is in response to your request dated October 14, 1981 for an opinion concerning the escrow and trust fund coverage of A.R.S. § 32-1185, as it relates to the trust account recovery fund, A.R.S. § 32-1198.01. The questions posed are: (1) whether A.R.S. § 32-1185 protects persons who engage brokers to sell their manufactured home, and (2) does the failure of a broker to disburse earnest monies to such persons constitute a violation of A.R.S. § 32-1185 giving rise to a claim against the trust account recovery fund under A.R.S. § 32-1198.01, et seq.?

A.R.S. § 32-1185, in pertinent part, states:

A. Each dealer or broker licensed pursuant to this article who sells manufactured homes or factory-built buildings shall maintain a trust account or an escrow account with a financial institution or escrow agent located in the state and shall deposit all earnest money received for the sale of manufactured homes or factory-built buildings in such account.

B. All earnest money deposited in the trust or escrow account shall be held in such account until one of the following is completed:

1. Application for title transfer has been made.

2. The transaction involved is consumated or terminated and proper accounting is made.

C. Upon completion of subsection B of this section, the earnest money deposit shall be conveyed to the lending institution or the dealer, broker or purchaser, whichever is applicable.

Any person "damaged as a result of an act or omission by . . . broker of manufactured home" constituting a violation of A.R.S. § 32-1185 may make a claim against the trust fund recovery act. A.R.S. § 32-1198.03.

A.R.S. § 32-1185 does not expressly include owners of manufactured homes who hire brokers. Thus, it must be determined (1) whether the legislature intended to exclude such persons from the protection of the trust and escrow account provisions of A.R.S. § 32-1185, and (2) whether the legislature intended brokers to retain the owner's share of an earnest money deposit. In most transactions a dealer or lending institution has legal title to the manufactured home and, therefore, is entitled to the earnest money deposit at the close of the transaction. In the example posited by your question, the broker acts as the agent for the owner of a used manufactured home. Funds held in the escrow or trust account in fact belong to the owner and not to the broker.

A.R.S. § 32-1185 is intended to protect owners of manufactured homes and buyers from the unauthorized disbursement of earnest money. The statute expressly requires disbursement of earnest money to lending institutions and/or dealers. For no discernible reason, the legislature did not include persons using brokers to sell their manufactured home. In this instance, the purpose of A.R.S. § 32-1185 would be served by extending protection to such persons. The trust account recovery fund, A.R.S. § 32-1198.01, et seq., provides protection to "any person" damaged as a result of a violation of A.R.S. § 32-1185. Since A.R.S. § 32-1185 covers brokered transactions, it is logical to conclude that the legislature intended A.R.S. § 32-1198.03 to apply to sellers relying on brokers. Otherwise, A.R.S. § 32-1185 requires brokers to disburse earnest money deposits to buyers but not to sellers. There is no logical basis for such discrimination against sellers. That the legislature intended to include sellers within the protections of A.R.S. §§ 32-1185 and 32-1198.03 is supported by reference to the purposes of the manufactured housing legislation:

A. The office of manufactured housing is established to further the public interests of safety and welfare. . . . The office (of manufactured housing) shall accomplish such purposes by . . . the enforcement of regulations and laws pertaining to the licensing of . . . brokers

B. It is also the purpose of this article to establish a procedure to protect the consumer of such products and services.

A.R.S. 32-1171 (emphasis added)

A.R.S. § 32-1172.5 defines a broker as:

any person who, on behalf of another for compensation, sells . . . or attempts to negotiate or acts as an agent for the sale or exchange of a used manufactured home

The manufactured housing regulatory scheme protects, among others, consumers of brokerage services. The term "consumer" in this context includes a buyer or seller of a used manufactured home. A.R.S. § 32-1172.5. Thus, one of the express purposes of the legislation is to protect sellers of used manufactured homes.

Although A.R.S. § 32-1185.C can be read to apply only to lending institutions, dealers, brokers and buyers, a literal reading of the statute leads to an absurd result. The statute requires the deposit of all earnest monies in an escrow or trust account. A literal reading of the statute, excluding a seller employing a broker would prohibit disbursement of the seller's share of the earnest money. The disbursement of earnest monies to the seller could, under a literal reading, constitute a violation of A.R.S. § 32-1185. Thus, by disbursing funds to the seller, the broker could risk a license revocation. That result is absurd.

It is well established that when the literal language of a statute will result in an absurdity, an impossibility or a meaning which from the general context of the statute, is clearly at variance with the legislative intent, courts may and will

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alter, modify or supply words to the statute
in order to give effect to the manifest
intention of the legislature.

Keller v. State of Arizona, 46 Ariz. 106, 117, 47 P.2d 442
(1938). The only way to remedy the absurdity is to supply the
phrase "seller of a used manufactured home" to A.R.S. § 32-1185
in order to give effect to the presumed intent of the
legislature.

In our opinion, A.R.S. § 32-1185.C includes persons
who engage brokers to assist them in the sale of used
manufactured homes. The broker's failure to disburse earnest
money to such persons is a violation of A.R.S. § 32-1185 and
supports a claim against the trust account recovery fund under
A.R.S. § 32-1198.01, et seq.

Sincerely,



BOB CORBIN
Attorney General

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