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**MEMORANDUM**

TO: Interested Parties

FROM: Real Estate Commission

SUBJECT: Claim from the Real Estate Recovery Fund

In summary, the law on the real estate recovery fund states that any person aggrieved by an act, representation, transaction, or conduct of a duly licensed real estate broker or salesperson, upon the grounds of fraud, misrepresentation, or deceit, may recover upon the Commission's settlement of a claim or by order of the circuit court or district court of the county where the violation occurred, an amount of not more than \$25,000 per transaction. No action for a judgment which subsequently results in a court order for collection from the real estate recovery fund shall be started later than **two years from the accrual of the cause of action thereon**.

After a judgment based on "fraud, misrepresentation, or deceit" is obtained and after "the aggrieved person has fully pursued and exhausted all remedies available to the person for recovering the amount awarded by the judgment of the court", the court may issue an order "directed to the Commission requiring payment from the real estate recovery fund."

The aggrieved person shall **notify** the Commission in writing **simultaneously** upon filing a complaint in the court and commencing action for a judgment against a real estate licensee which may result in collection from the real estate recovery fund. The notification shall include the statutory notice and two copies of the complaint and any pleadings filed with the courts. The Commission has no forms for claims to the real estate recovery fund.

The Commission will be represented by contracted attorneys and may intervene in and defend any such action. The Commission's attorneys do **not** represent the plaintiffs (aggrieved persons) or the defendants (real estate licensees) but represents the Commission and the statutory interests of the real estate recovery fund.

In addition, the Commission encourages you to file a complaint with the Regulated Industries Complaints Office (RICO) for possible disciplinary action against the real estate licensees. They can be contacted at:

Regulated Industries Complaints Office  
Leiopapa A Kamehameha Building  
235 South Beretania Street, 9<sup>th</sup> floor  
Honolulu, Hawaii 96813  
Telephone: (808) 587-3222

Should you have any questions, please call (808) 586-2643.

Attachments  
RECOVMEMO 120802

~~§16-99-70 Hearings. (a) When the commission denies an application for registration or renewal of a school, or deems it proper to revoke or suspend the registration of any school, the approval of any course, or the certification of any instructor, the commission shall notify in writing the person or school involved of the commission's action. The notification shall include a concise statement of the reasons for the commission's action and a statement that the person or school involved may request a hearing.~~

~~(b) Requests for a hearing shall be filed with the commission within sixty days of the date of the letter informing the school or instructor of the commission's action.~~

~~(c) If a demand for a hearing is filed within the time prescribed, the commission shall order a hearing pursuant to chapters 91 and 92, HRS, and chapter 16-201, Administrative Practice and Procedure. [Eff and comp 3/3/84; am 9/29/86; comp 11/3/90; comp 2/25/91; am and comp 5/21/01] (Auth: HRS §§467-4, 467-25.5) (Imp: HRS §467-25.5)~~

§16-99-71 Repealed. [R 5/21/01]

### SUBCHAPTER 6

#### PRACTICE AND PROCEDURE

~~§16-99-75 Administrative practice and procedure. The rules of practice and procedure for real estate shall be as provided in chapter 16-201, the rules of practice and procedure of the department of commerce and consumer affairs, which are incorporated by reference and made a part of this chapter. [Eff 9/29/86; am and comp 11/3/90; comp 2/25/91; comp 5/21/01] (Auth: HRS §§91-2, 442-5) (Imp: HRS §§91-2, 442-5)~~

### SUBCHAPTER 7

#### RECOVERY FUND

§16-99-79 Recovery fund settlement procedures. Upon the occurrence of all of the following, the commission may settle any subsequent claim against the real estate recovery fund involving a licensee that was previously named in an

order and on whose behalf the commission had been required to make payments out from the recovery fund:

- (1) The claimant is seeking recovery against the same licensee as named in an order for which the commission had been required to make a payment from the recovery fund;
- (2) The claimant is similarly situated as the claimant named in an order for which the commission has been required to make a payment from the recovery fund;
- (3) The claimant notifies the commission in writing within the same time period specified in section 467-18, HRS, that it has commenced an action for a judgment which may result in collection from the real estate recovery fund;
- (4) The claimant files a verified claim with the commission stating with particularity the reasons, grounds, and evidence in support of claimant's request for settlement directly with the commission;
- (5) The claimant gives reasonable notice to the licensee at the licensee's last known address by registered or certified mail, restricted delivery to addressee only, return receipt requested that claimant intends to settle the claim directly with the commission together with a copy of the verified claim. Where it is impossible to give licensee notice by mail, claimant shall give notice to licensee by publication once in a newspaper of general circulation in the State, that the claimant intends to settle the claim directly with the commission, a summary of the reasons, grounds, and evidence supporting claimant's relief from the recovery fund. Any notice given shall also contain a statement to the effect that any payment from the recovery fund shall result in an automatic termination of the licensee's license;
- (6) The licensee has had an opportunity to respond within a reasonable time, in writing, to claimant's verified claim;
- (7) That claimant is not a spouse of the licensee, or the personal representative of such spouse;
- (8) The claimant has made all reasonable searches and inquiries to ascertain whether the licensee is possessed of real or personal property or other assets, which may be used to satisfy the claim and that by such search the claimant has discovered no such assets;
- (9) The commission is satisfied, that there is sufficient evidence to support a settlement of the claim; and

- (10) The settlement is in the best interest of the real estate recovery fund. [Eff and comp 11/3/90; comp 2/25/91; am and comp 5/21/01] (Auth: HRS §467-4) (Imp: HRS §467-16)

~~SUBCHAPTER 9~~

ORAL TESTIMONY

§16-99-83 Oral testimony. (a) The commission shall accept oral testimony on any item which is on the commission's agenda, provided that the testimony shall be subject to the following conditions:

- (1) Each person seeking to present oral testimony shall so notify the commission no later than forty-eight hours prior to the meeting, and at that time shall state the item on which testimony is to be presented;
- (2) The commission may request that any person providing oral testimony submit the remarks, or a summary of the remarks, in writing to the commission;
- (3) The commission may rearrange the items on the agenda for the purpose of providing for the most efficient and convenient presentation of oral testimony;
- (4) Persons presenting oral testimony, at the beginning of the testimony, shall identify themselves and the organization, if any, that they represent;
- (5) The commission may limit oral testimony to a specified time period but in no case shall the period be less than five minutes, and the person testifying shall be informed prior to the commencement of the testimony of the time constraints to be imposed; and
- (6) The commission may refuse to hear any testimony which is irrelevant, immaterial, or unduly repetitious to the agenda item on which it is presented.

(b) Nothing in this chapter shall require the commission to hear or receive any oral or documentary evidence from a person on any matter which is the subject of another pending proceeding subject to the hearing relief, declaratory relief, or rule relief provisions of chapter 16-201.

(c) Nothing in this chapter shall prevent the commission from soliciting oral remarks from persons present at the meeting or from inviting ~~persons to make presentations to the commission on any particular matter on the~~

~~§467-15 Hearings. In every case where it is proposed to revoke or suspend the exercise of any license, fine any person holding a license, registration, or certificate, terminate any registration or certificate, or take any other action authorized by law, for any of the causes enumerated in section 467-14, the person concerned shall be given notice and hearing in conformity with chapter 91.~~

In all proceedings before it, the commission and each member thereof shall have the same powers respecting administering oaths, compelling the attendance of witnesses and the production of documentary evidence, and examining witnesses, as are possessed by circuit courts. In cases of disobedience by any person of any order of the commission, or any member thereof, or of any subpoena issued by it, or the member, or the refusal of any witness to testify to any matter to which the witness may be questioned lawfully, any circuit judge, on application by the commission, or a member thereof, shall compel obedience as in the case of disobedience of the requirements of a subpoena issued by a circuit court, or a refusal to testify therein.

~~§467-15.5 License issued after a revocation or automatic termination. A person whose license has been revoked, or automatically terminated in accordance with section 467-18(e), may apply for a license as a new applicant after the revocation or termination period and, if applicable, after repayment to the real estate recovery fund and compliance with all the terms of the commission's final order. Any person who was previously licensed as a real estate broker shall apply as a real estate salesperson. Any person who was previously licensed as a real estate salesperson shall apply as a real estate salesperson. A new applicant refused licensure as a real estate broker pursuant to this section shall not be entitled to a hearing on that refusal.~~

**§467-16 Real estate recovery fund; use of fund; fees.** (a) The commission shall establish and maintain a trust fund which shall be known as the real estate recovery fund from which any person aggrieved by an act, representation, transaction, or conduct of a duly licensed real estate broker, or real estate salesperson, upon the grounds of fraud, misrepresentation, or deceit, may recover upon the commission's settlement of a claim or by order of the circuit court or district court of the county where the violation occurred, an amount of not more than \$25,000 per transaction for damages sustained by the fraud, misrepresentation, or deceit, including court costs and fees as set by law, and reasonable attorney fees as determined by the court.

(b) When any person makes application for an original license to practice as a real estate broker or salesperson the person shall pay, in addition to the person's original license fee, a real estate recovery fund fee as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91 for deposit in the real estate recovery fund. If the commission does not issue the license, this fee shall be returned to the applicant.

(c) The commission, as the trustee of the real estate recovery fund, shall be authorized to expend the funds to:

- (1) Retain private legal counsel to represent the commission in any action involving or which may result in payment from the real estate recovery fund;
- (2) Retain a certified public accountant for accounting and auditing of the real estate recovery fund;

- (3) Employ necessary personnel, not subject to chapters 76 and 77, to assist the commission in exercising its powers and duties with respect to the real estate recovery fund; and
- (4) Retain a consultant to recover and collect any payments from the real estate recovery fund plus interest from the judgment debtor.

**§467-17 Additional payments to fund.** (a) If the balance remaining in the real estate recovery fund is less than \$350,000, the department of commerce and consumer affairs shall assess every real estate licensee an additional payment to the recovery fund as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91 for deposit in the real estate recovery fund.

(b) The failure of the licensee to pay the assessment within sixty days from the date of assessment shall constitute a forfeiture of the license. The commission may impose other penalties or requirements as a condition to restoration of the license.

**§467-18 Statute of limitation; recovery from fund.** (a) No action for a judgment that subsequently results in an order for collection from the real estate recovery fund shall be started later than two years from the accrual of the cause of action thereon. When any aggrieved person commences action for a judgment that may result in collection from the real estate recovery fund, the aggrieved person shall notify the commission in writing to this effect at the time of the commencement of the action and shall submit prescribed documents. The commission may intervene in and defend any such action.

(b) When any aggrieved person recovers a valid judgment in any circuit or district court where the violation occurred against any real estate broker, or real estate salesperson, upon the grounds of fraud, misrepresentation, or deceit, which occurred on or after January 1, 1968, the aggrieved person may, upon the termination of all proceedings, including reviews and appeals in connection with the judgment, file a verified claim in the court in which the judgment was entered and, upon ten days written notice to the commission, may apply to the court for an order directing payment out of the real estate recovery fund, of the amount unpaid upon the judgment, subject to the limitations stated in this section. For any cause of action occurring prior to January 1, 1968, the aggrieved person must proceed against the existing bond covering the license which was in force prior to the establishment of the real estate recovery fund.

(c) The court shall proceed upon the application in a summary manner and, upon the hearing thereof, the aggrieved person shall be required to show:

- (1) The person is not a spouse of debtor, or the personal representative of such spouse;
- (2) The person has complied with all the requirements of this section;
- (3) The person has obtained a judgment as set out in subsection (b) of this section, stating the amount thereof and the amount owing thereon at the date of the application;
- (4) The person has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets, liable to be sold or applied in satisfaction of the judgment;

- (5) That by such search the person has discovered no personal or real property or other assets liable to be sold or applied, or that the person has discovered certain of them, describing them, owned by the judgment debtor and liable to be so applied, and that the person 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; and
- (6) That where the real estate broker or real estate salesperson is a debtor in a bankruptcy proceeding, the aggrieved person has obtained an order from the bankruptcy court declaring the judgment against the real estate broker or real estate salesperson to be non-dischargeable.
- (d) The court shall make an order directed to the commission requiring payment from the real estate recovery fund of whatever sum it finds to be payable upon the claim, pursuant to and in accordance with the limitations contained in this section, if the court is satisfied, upon the hearing, of the truth of all matters required to be shown by the aggrieved person by subsection (c) of this section and that the aggrieved person has fully pursued and exhausted all remedies available to the person for recovering the amount awarded by the judgment of the court.
- (e) Should the commission pay from the real estate recovery fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker or real estate salesperson, the license of the real estate broker or real estate salesperson shall be automatically terminated upon the issuance of a court order authorizing payment from the real estate recovery fund. No real estate broker or real estate salesperson shall be eligible to receive a new license until the expiration of at least five years from the effective date of the termination of the license and until the terminated real estate broker or real estate salesperson has repaid in full, plus interest at the rate provided for in section 478-3, the amount paid from the real estate recovery fund on the terminated real estate broker's or real estate salesperson's account.
- (f) If, at any time, the money deposited in the real estate recovery fund is insufficient to satisfy any duly authorized claim or portion thereof, the commission, shall, when sufficient money has been deposited in the real estate recovery 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 six per cent a year.

**§467-19 Management of fund.** (a) The sums received by the real estate commission for deposit in the real estate recovery fund shall be held by the commission in trust for carrying out the purpose of the real estate recovery fund. The real estate commission, as the trustee of the recovery fund, shall be authorized to expend the funds to retain private legal counsel to represent the commission in any action involving the real estate recovery fund. These funds may be invested and reinvested in the same manner as funds of the state employees retirement system, and the interest from these investments shall be deposited to the credit of the real estate education fund, and which shall be available to the commission for educational purposes, which is hereby created. The real estate commission, as trustee of the real estate education fund, may invest and reinvest the real estate education fund in the same manner as funds of the state employees retirement system. The commission for investment purposes, may combine the real estate education and recovery funds and invest and reinvest the combined funds in the same manner as

funds of the state employees retirement system. The commission shall keep separate accounting records for the two funds.

(b) Educational purposes as used in subsection (a) shall include those purposes to promote the advancement of education and research in the field of real estate for the benefit of the public and those licensed under the provisions of this chapter and the improvement and more efficient administration of the real estate industry. The commission, in its discretion, may use any and all moneys in the real estate education fund consistent with the above. The commission and the director of commerce and consumer affairs may also use moneys in the education fund to employ necessary personnel, not subject to chapters 76 and 77, to fully effectuate subsection (b) and carry out its purpose.

**§467-20 False statement.** It shall be unlawful for any person or the person's agent to testify before or file with the commission, or the testing service agency designated by the commission, any notice, statement, or other document required under this chapter, that is false or untrue or contains any material misstatement of fact, or contains forgery. In addition to any sanctions or remedies as provided in this chapter, any violation of this section shall constitute a misdemeanor punishable pursuant to section 706-640 or 706-663, or both, and not pursuant to section 467-26.

**§467-21 The real estate commission has standing in court.** When the real estate commission receives notice, as provided in section 467-18(a), the commission may enter an appearance, file an answer, appear at the court hearing, defend the action, or take whatever other action it deems appropriate on behalf and in the name of the defendant, and take recourse through any appropriate method of review on behalf of, and in the name of, the defendant. The commission or its legal representative shall be served with all pleadings in an action which may result in a recovery from the real estate recovery fund.

Settlement of any claim against the real estate recovery fund may be made only with the agreement of a majority of the commission that settlement is in the best interest of the real estate recovery fund.

**§467-22 Subrogation of rights.** When, upon the order of the court, or upon the commission's settlement of a claim, the real estate commission has paid from the real estate recovery fund any sum to the judgment creditor, the commission shall be subrogated to all of the rights of the judgment creditor and the judgment creditor shall assign all the creditor's right, title, and interest in the judgment or settlement to the commission and any amount and interest so recovered by the commission on the judgment or settlement shall be deposited to the fund.

**§467-23 Waiver of rights.** The failure of an aggrieved person to comply with this chapter relating to the real estate recovery fund shall constitute a waiver of any rights hereunder.

**§467-24 Maximum liability.** Notwithstanding any other provision, the liability of the real estate recovery fund shall not exceed \$50,000 for any one licensee.

**§467-25 Disciplinary action against licensee.** Nothing contained herein shall limit the authority of the real estate commission to take disciplinary action against any licensee for a violation of this chapter, or the rules and regulations of the commission; nor shall the repayment in full of all obligations to the real estate recovery fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought pursuant to this chapter.

~~**§467-25.5 Registration of schools, instructors, fees.** (a) Schools. Any person may apply to the real estate commission for a certificate of registration as a real estate school upon the payment to the department of commerce and consumer affairs of an initial registration fee and thereafter a biennial registration fee. No school shall be granted a certificate of registration unless it maintains a sufficient number of registered instructors, requires a course of training of not less than that required by section 467-8, and meets other requirements as provided in rules adopted by the commission.~~

~~(b) Instructors. The commission shall issue a certificate of registration as instructor to any person who meets its requirements and pays the proper fee.~~

~~(c) The fees, including a nonrefundable processing fee, for a certificate of registration and renewal thereof for schools and instructors shall be as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91.~~

~~(d) Examination fee for instructors requesting to be certified if and when required shall be as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91.~~

~~(e) In the event a certificate of registration is forfeited, the certificate of registration may be reinstated upon payment of the renewal fee that is immediately due and owing, past due renewal fees, and penalty fees as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91.~~

~~(f) The commission shall adopt rules it deems proper to fully effectuate this section. The adoption of rules shall include, but not be limited to:~~

- ~~(1) Requirements for registration as a real estate school and as an instructor;~~
- ~~(2) Requirements for a certificate of registration renewal for a real estate school and an instructor; and~~
- ~~(3) Reinstatement requirements for a forfeited certificate of registration for a real estate school and an instructor.~~

~~(g) The biennial renewal fee shall be paid to the department of commerce and consumer affairs on or before December 31 of every even-numbered year. Failure, neglect, or refusal of a holder of any duly issued certificate of registration to pay the biennial renewal fee shall constitute a forfeiture of the certificate of registration. The certificate of registration may be reinstated upon written application therefor, payment to the department of the sum specified in subsection (e), and satisfaction of other requirements for reinstatement of a certificate of registration as provided in rules adopted by the commission.~~