ALAN WILSON
ATTORNEY GENERAL

August 31, 2022

The Honorable Chip Huggins
Member
South Carolina House of Representatives
308 Wayworth Court
Columbia, South Carolina 29212

Dear Representative Huggins:

We received your letter requesting an opinion from this Office concerning earnest money or trust funds that remain unsettled after the termination of a real estate transaction or the failure of such a transaction to close. In your letter, you explained

> there are brokerages in the state with thousands of dollars of funds in their trust accounts that are tied to transactions that have terminated years ago. It's not uncommon to hear of a trust account that has funds that are 5, 10, or more years old.
>
> The only alternative to litigation or holding the money in trust indefinitely that has been provided by the Real Estate Commission is that after five years these funds can be deposited with the Treasurer's Office as unclaimed property.
>
> However, the Treasurer's unclaimed property deposit procedures require the brokerage to make a judgment about which party should be named as deserving the money and this could make the brokerage vulnerable to a license law complaint.
>
> Under existing license law and the interpretation of license law by the Real Estate Commission, real estate licensees are left with few options when it comes to unclaimed earnest money.

Accordingly, you request an opinion on the following questions:

1. Is there an interpretation of the law under § 40-57-10 et. al that allows for real estate licensees to disburse these funds?

2. Does § 15-3-530 or other statute of limitations apply to real estate agents? Does this section allow real estate licensees to disburse these earnest money

funds after 3 years as they deem appropriate to the parties to the real estate transaction without fear of civil or administrative penalty?

Law/Analysis

Chapter 57 of title 40 of the South Carolina Code (2011 & Supp. 2021) governs real estate professions including brokers, broker-in-charge, salespersons, and property managers. In 2016, the Legislature adopted section 40-57-136 of the South Carolina Code (Supp. 2021) governing trust accounts. This provision not only requires the establishment of a trust account by brokers-in-charge and property managers-in-charge, it also governs disbursements from those accounts. The relevant portions of the statute provide:

> (D)(1)(a) Trust funds received by a broker-in-charge in a real estate sales or exchange transaction must be deposited as follows in a separate real estate trust account:
>
> > (i) cash or certified funds must be deposited within forty-eight hours of receipt, excluding Saturday, Sunday, and bank holidays;
> >
> > (ii) checks must be deposited within forty-eight hours after written acceptance of an offer by the parties to the transaction, excluding Saturday, Sunday, and bank holidays.
>
> (b) Trust funds received by a broker-in-charge in connection with a real estate sales or exchange transaction and deposited in the real estate trust account shall remain in the trust account until consummation or termination of the transaction, at which time the undisputed trust funds must be disbursed in accordance with the contract which directs the broker-in-charge to hold the trust funds, and a full accounting must be made to the parties.
>
> (2) A broker-in-charge or property manager-in-charge who disburses trust funds from a designated trust account under the following circumstances is considered to have properly fulfilled the duty to the account:
>
> > (a) upon rejection of an offer to buy, sell, rent, lease, exchange, or option real estate;
> >
> > (b) upon the withdrawal of an offer not yet accepted by the offeree; or

> (c) at the closing of the transaction.
>
> (E) If a dispute concerning the entitlement to, and disposition of, trust funds arises between a buyer and a seller, and the dispute is not resolved by reasonable interpretation of the contract by the parties to the contract, the deposit must be held in the trust account until the dispute is resolved by:
>
> (1) a written agreement which:
>
> (a) directs the disposition of monies signed by all parties claiming an interest in the trust monies, and
>
> (b) must be separate from the contract which directs the broker-in-charge or property manager-in-charge to hold the monies;
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> (2) filing an interpleader action in a court of competent jurisdiction;
>
> (3) an order of a court of competent jurisdiction; or
>
> (4) voluntary mediation.

S.C. Code Ann. § 40-57-136(D) & (E) (emphasis added).

In interpreting this statute, we follow the rules of statutory construction.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). . . . . "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

According to the plain terms of the statute, funds deposited in trust must remain in trust "until consummation or termination of the transaction." S.C. Code Ann. § 40-57-136(D)(1)(b). According to your letter, these transactions were never consummated. Section 40-57-136 does not specify what is considered a "termination" of a transaction, but subsection (2) provides a safe harbor regarding the duty of brokers-in-charge who disburse funds from trust so long as one of three circumstances occur: (1) upon the rejection of the offer, (2) upon the withdrawal of an offer

that has not been accepted, or (3) at the closing of the transaction. Thus, at a minimum, the Legislature intended to allow brokers-in-charge to disburse the funds under these three scenarios.

Once a termination occurs, section 40-57-136(D)(1)(b) specifies "trust funds must be disbursed in accordance with the contract which directs the broker-in-charge to hold the trust funds . . . ." Therefore, it is important that the contract specify how trust funds are distributed in the event of a termination. However, section 40-57-136 contemplates that disputes over disbursements can arise. Section 40-57-136(E) provides that if a dispute arises between the buyer and seller and it cannot be resolved by a reasonable interpretation of the contract by the parties, the dispute shall be resolved one of three ways - the parties can enter into a written agreement, an interpleader action can be filed, the entry of a court order, or voluntary mediation by the parties. While most of these options are not within the control of the broker-in-charge, he or she could file an interpleader action under Rule 22(a), SCRCP and deposit the disputed funds with a court.[1] In our review of chapter 57 of title 40, outside of the provisions contained in section 40-57-136, we did not find any other provisions addressing the disbursement of trust funds.

Next, you inquire as to whether section 15-3-530 of the South Carolina Code (2005) or any other statute of limitations apply to real estate agents. Section 15-3-530 does not specifically state its application to real estate transactions. However, subsection (1) requires "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520" must be brought within three years. S.C. Code Ann. § 15-5-530(1). Presumably earnest money or trust funds are deposited in a brokerage's trust account pursuant to the terms of a contract between a buyer and seller. Therefore, we believe section 15-5-530(1) could apply to the parties to the contract. But, a broker-in-charge generally is not a party to such a contract. Therefore, the three-year statute of limitations under section 15-5-530(1) would not apply to brokers-in-charge regarding a contract between a buyer and seller.

However, other provisions in section 15-3-530 may impose a three-year statute of limitations on suits against brokers-in-charge. Section 15-3-530(2) sets a three-year statute of limitations on "an action upon a liability created by statute other than a penalty of forfeiture." Section 40-57-136, as cited above, sets forth the broker-in-charge's responsibilities regarding trust funds. Therefore, section 15-3-530(2) could imposes a three-year statute of limitations on claims made against brokers-in-charge for failing to meet their statutory obligations under section 40-57-136. Moreover, because brokers-in-charge hold funds in trust for the benefit of others, a court may also

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[1] First Union Nat'l Bank of S.C. v. FCVS Commc'ns, 321 S.C. 496, 499, 469 S.E.2d 613, 616 (Ct.App.1996), rev'd in part, 328 S.C. 290, 494 S.E.2d 429 (1997) ("[T]he primary purpose of interpleader is to enable a neutral stakeholder, usually an insurance company or a bank, to shield itself from liability for paying over the stake to the wrong party. This is done by forcing all the claimants to litigate their claims in a single action brought by the stakeholder . . . . There need not be actual competing claims against the stakeholder for him to be entitled to interpleader, as long as there is the potential for multiple claims." (citations and internal quotation marks omitted)).

view them as fiduciaries. Our courts have determined the three-year statute of limitation under section 15-3-530 applies to breach of fiduciary duty claims. Mazloom v. Mazloom, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009), aff'd, 392 S.C. 403, 709 S.E.2d 661 (2011). Nonetheless, we must keep in mind in either of these types of actions, the statute of limitations does not start to run until the cause of action occurs and often until a party "either knew or should have known that some legal right had been invaded," which in this case would involve the disbursement of the funds. City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010) (applying the discovery rule to section 15-3-530). Accordingly, the application of the three-year statute of limitations under these circumstances is unlikely to provide protection to brokers-in-charge that desire to disburse funds that remain in dispute.

Conclusion

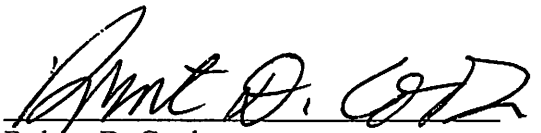
Section 40-57-136 requires funds received by a broker-in-charge to be placed in a real estate trust account when received. This provision allows the broker-in-charge to disburse these funds when the transaction is either consummated or terminated. However, such disbursement must be in accordance with the terms of the contract and the broker-in-charge must provide a full accounting of these funds to the parties. While section 40-57-136 does not specify all circumstances under which the funds may disbursed, subsection (D)(2) provides three circumstances in which the broker-in-charge is deemed to have fulfilled his or her duty to the account. If the parties dispute who is entitled to the funds, section 40-57-136(E) requires the funds to remain in trust until the parties can come to a written agreement, submit to voluntary mediation, a court enters an order determining the disposition of the funds, or an interpleader action is filed in a court of competent jurisdiction. Brokers-in-charge may file an interpleader action to protect themselves from disbursing trust funds to the wrong party. However, outside of taking action through the courts, we agree with your assessment that brokers-in-charge have limited options in disbursing trust funds when the terms of contract are unclear or the parties dispute who is entitled to the funds. Therefore, we believe a legislative clarifications is needed to remedy the situations described in your letter.

We also note that while section 15-3-530 may offer a three-year statute of limitations for suits brought against brokers-in-charge for failing to meet their statutory obligations or breaching their fiduciary duties regarding the disbursement of trust funds, the statute would not begin to run until the disbursement takes place or the aggrieved party knew or should have known they were disbursed.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General