

STATE OF SOUTH DAKOTA
REAL ESTATE COMMISSION

IN THE MATTER OF:)
)
DISPOSITION OF EARNEST MONEY) DECLARATORY RULING
FOLLOWING A FAILED TRANSACTION)
)

The South Dakota Realtor’s Association (the “Association”), through its attorney Brett Koenecke, filed a Petition for Declaratory Ruling dated September 4, 2018. The Petition requests a declaratory ruling from the South Dakota Real Estate Commission (the “Commission”) concerning the applicability of SDCL 36-21-81 when a broker is unable to release money held in trust when an accepted offer and agreement fails to close. The Association requests resolution of the following question:

Does a broker violate SDCL 36-21A-81 if, after all applicable statutes of limitation have run, the broker returns the earnest money deposit to the remitter, or forwards an earnest money deposit to the State Treasurer as unclaimed property?

The Petition asserts that there are a number of earnest money deposits being held by licensed real estate brokers from transactions, that for various reasons, failed to consummate. The persons in the positions of purchaser and seller in the transactions are unable or unwilling to agree to written instructions disbursing the funds. In addition, neither party takes legal action to obtain a court order as the amounts are not economical. Eventually the parties move on and leave the broker holding the money in a trust account unable to disburse the funds out of concern for being disciplined for violating SDCL 36-21A-81.

STATE OF SOUTH DAKOTA
REAL ESTATE COMMISSION

The issue before the Commission is one of proper procedure. When the parties to a real estate transaction are being guided by licensed brokers, the broker who is selected to hold the earnest money should obtain written instructions at the outset of the transaction instructing the broker on disbursement of the money in the event the transaction fails to consummate. As the statutes and rules do not require this action by the broker, absence of an agreement is not a violation of Chapter 36-21A.

In absence of a written agreement obtained by the broker at the outset of a transaction, the Broker must consider SDCL 36-21A-77.

SDCL 36-21A-77: (emphasis added)

If for any reason the seller fails, refuses, neglects or is unable to consummate the transaction as provided in the purchase contract, and through no fault or neglect of the purchaser, the real estate transaction cannot be completed, the broker has no right to any portion of the deposit money which was deposited by the purchaser, even though the commission is earned. This deposit shall be returned to the purchaser at once.

SDCL 36-21A-77 requires a broker holding the earnest money to decide why the transaction did not close. Under this statute, if two conditions are met then the money must be returned to the purchaser. The first condition that must be answered is whether the transaction failed due to the seller being unable to perform. If the answer is yes, then the second condition must be met. That is whether the purchaser had no fault or neglect in the matter. If that answer is also yes, then the money must be returned to the purchaser.

STATE OF SOUTH DAKOTA
REAL ESTATE COMMISSION

If the answer to either of the forgoing questions is no, then the broker must abide by SDCL 36-21A-81. The two primary ways to comply with SDCL 36-21A-81 are to either: (1) have the parties to the transaction agree to written instructions, or (2) obtain a court order. There is no timeframe within which a broker is required to obtain written instructions from the parties, but it is most prudent to settle the written instructions when receiving the money. This prudent act on the part of the broker would avoid the need for a court order or reliance on this declaratory ruling. The second primary option under SDCL 36-21A-81 is obtaining a court order. The statute does not specify who may obtain the court order, so as the holding of the money affects the broker it is within reason that he or she is able to obtain an order. Any broker relying on this method should consult with their own counsel.

In the situation in which the declaratory ruling has been requested, broker compliance with SDCL 36-21A-81 is difficult if not impossible. In this situation the parties refuse to agree, and due to the length of time passing, the courts no longer have jurisdiction to decide the matter. This necessarily results in the broker holding the money until the broker decides to end his business endeavor, but even then, the issue of who the earnest money goes to is not resolved, it is merely out of the jurisdiction of the Commission. Such a result is clearly not the intention of Chapter 36-21A.

The purpose of the Commission is public protection. The public is protected by ensuring brokers are licensed and held accountable for their actions. As part of fulfilling this mission the Commission requires periodic audits of a brokers' trust accounting by the Commission's compliance officers. If earnest money were released by the broker to the remitter or to

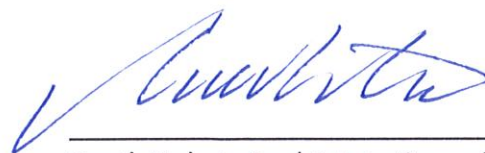
STATE OF SOUTH DAKOTA
REAL ESTATE COMMISSION

unclaimed property in the name of the remitter, this would be able to be confirmed during an audit. The money would not be able to simply disappear. As long as the broker follows the procedures called for by chapter 36-21A, and properly and correctly documents the same, the parties involved would be able to determine where the money went and decide whether to pursue the matter further.

The Commission hereby determines that SDCL 36-21A-81 is not violated when, after all applicable statutes of limitation have run, the broker returns the earnest money deposit to the remitter or forwards an earnest money deposits to the State Treasurer as unclaimed property of the remitter. Before this action is undertaken, the broker must document that the broker has considered fault under SDCL 36-21A-77, and that the broker has consulted the courts or a licensed attorney and been informed that an order directing the disbursement of the earnest money can no longer be obtained.

The Commission cannot state as part of this declaratory ruling, how much time must pass before a court no longer has jurisdiction over a matter as pursuant to SDCL 1-26-15 the statutes of limitation are not "statutory provisions, rules, or orders of the agency." For an answer to that issue a broker will need to consult his or her own counsel or if necessary, a court of competent jurisdiction.

Dated and signed this 8th day of November, 2018.



South Dakota Real Estate Commission