

Article 2.

Real Estate Education and Recovery Fund.

**§ 93A-16. Real Estate Education and Recovery Fund created; payment to fund; management.**

(a) There is hereby created a special fund to be known as the "Real Estate Education and Recovery Fund" which shall be set aside and maintained by the North Carolina Real Estate Commission. The fund shall be used in the manner provided under this Article for the payment of unsatisfied judgments where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any real estate broker. The Commission may also expend money from the fund to create books and other publications, courses, forms, seminars, and other programs and materials to educate licensees and the public in real estate subjects. However, the Commission shall make no expenditures from the fund for educational purposes if the expenditure will reduce the balance of the fund to an amount less than two hundred thousand dollars (\$200,000).

(b) On September 1, 1979, the Commission shall transfer the sum of one hundred thousand dollars (\$100,000) from its expense reserve fund to the Real Estate Education and Recovery Fund. Thereafter, the Commission may transfer to the Real Estate Education and Recovery Fund additional sums of money from whatever funds the Commission may have, provided that, if on December 31 of any year the amount remaining in the fund is less than fifty thousand dollars (\$50,000), the Commission may determine that each person or entity licensed under this Chapter, when renewing a license, shall pay in addition to the license renewal fee, a fee not to exceed ten dollars (\$10.00) per broker as shall be determined by the Commission for the purpose of replenishing the fund.

(c) The Commission shall invest and reinvest the monies in the Real Estate Education and Recovery Fund in the same manner as provided by law for the investment of funds by the clerk of superior court. The proceeds from such investments shall be deposited to the credit of the fund.

(d) The Commission shall have the authority to adopt rules and procedures not inconsistent with the provisions of this Article, to provide for the orderly, fair and efficient administration and payment of monies held in the Real Estate Education and Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, ss. 1, 2; 1987, c. 516, ss. 3-5.; 2000-140, s. 19(b); 2001-487, s. 23(c); 2005-395, s. 13; 2011-217, s. 10.)

**§ 93A-17. Grounds for payment; notice and application to Commission.**

(a) An aggrieved person who has suffered a direct monetary loss by reason of the conversion of trust funds by any licensed real estate broker shall be eligible to recover, subject to the limitations of this Article, the amount of trust funds converted and which is otherwise unrecoverable provided that:

- (1) The act or acts of conversion which form the basis of the claim for recovery occurred on or after September 1, 1979;
- (2) The aggrieved person has sued the real estate broker in a court of competent jurisdiction and has filed with the Commission written notice of such lawsuit within 60 days after its commencement unless the claim against the Real Estate Education and Recovery Fund is for an amount less than three thousand dollars (\$3,000), excluding attorneys' fees, in which case the notice may be filed within 60 days after the termination of all judicial proceedings including appeals;
- (3) The aggrieved person has obtained final judgment in a court of competent jurisdiction against the real estate broker on grounds of conversion of trust

funds arising out of a transaction which occurred when such broker was licensed and acting in a capacity for which a license is required; and

- (4) Execution of the judgment has been attempted and has been returned unsatisfied in whole or in part.

Upon the termination of all judicial proceedings including appeals, and for a period of one year thereafter, a person eligible for recovery may file a verified application with the Commission for payment out of the Real Estate Education and Recovery Fund of the amount remaining unpaid upon the judgment which represents the actual and direct loss sustained by reason of conversion of trust funds. A copy of the judgment and return of execution shall be attached to the application and filed with the Commission.

(b) For the purposes of this Article, the term "trust funds" shall include all earnest money deposits, down payments, sales proceeds, tenant security deposits, undisbursed rents and other such monies which belong to another or others and are held by a real estate broker acting in that capacity. Trust funds shall also include all time share purchase monies which are required to be held in trust by G.S. 93A-45(c) during the time they are, in fact, so held. Trust funds shall not include, however, any funds held by an independent escrow agent under G.S. 93A-42 or any funds which the court may find to be subject to an implied, constructive or resulting trust.

(c) For the purposes of this Article, the terms "licensee" and "broker" shall include only individual persons licensed under this Chapter as brokers. The terms "licensee" and "broker" shall not include a time share developer, time share project, independent escrow agent, corporation or other entity licensed under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 14; 1987, c. 516, s. 6; 1999-229, s. 8.; 2000-140, s. 19(b); 2005-395, s. 14; 2011-217, s. 11.)

#### **§ 93A-18. Hearing; required showing.**

Upon application by an aggrieved person, the Commission shall conduct a hearing and the aggrieved person shall be required to show that the aggrieved person:

- (1) Is not a spouse of the judgment debtor or a person representing the spouse;
- (2) Is making application not more than one year after termination of all judicial proceedings, including appeals, in connection with the judgment;
- (3) Has complied with all requirements of this Article;
- (4) Has obtained a judgment as described in G.S. 93A-17, stating the amount owing thereon at the date of application;
- (5) 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;
- (6) After searching as described in subdivision (5) of this section, has discovered no real or personal property or other assets liable to be sold or applied, or has discovered certain of them, describing them, but the amount so realized was insufficient to satisfy the judgment, stating the amount realized and the balance remaining due on the judgment after application of the amount realized;
- (7) Has diligently pursued the aggrieved person's remedies, which include attempting execution on the judgment against all the judgment debtors, which execution has been returned unsatisfied; and
- (8) Knows of no assets of the judgment debtor and has attempted collection from all other persons who may be liable for the transaction for which the aggrieved person seeks payment from the Real Estate Education and Recovery Fund if

there be any such other persons. (1979, c. 614, s. 1; 1987, c. 516, s. 7; 2001-487, s. 23(d); 2011-217, s. 12.)

**§ 93A-19. Response and defense by Commission and judgment debtor; proof of conversion.**

(a) Whenever the Commission proceeds upon an application as set forth in this Article, counsel for the Commission may defend such action on behalf of the fund and shall have recourse to all appropriate means of defense, including the examination of witnesses. The judgment debtor may defend such action on his or her own behalf and shall have recourse to all appropriate means of defense, including the examination of witnesses. Counsel for the Commission and the judgment debtor may file responses to the application, setting forth answers and defenses. Responses shall be filed with the Commission and copies shall be served upon every party by the filing party. If at any time it appears there are no triable issues of fact and the application for payment from the fund is without merit, the Commission shall dismiss the application. A motion to dismiss may be supported by affidavit of any person or persons having knowledge of the facts and may be made on the basis that the application or the judgment referred to therein do not form a basis for meritorious recovery within the purview of G.S. 93A-17, that the applicant has not complied with the provisions of this Article, or that the liability of the fund with regard to the particular licensee or transaction has been exhausted; provided, however, notice of the motion shall be given at least 10 days prior to the time fixed for hearing. If the applicant or judgment debtor fails to appear at the hearing after receiving notice of the hearing, the applicant or judgment debtor waives the person's rights unless the absence is excused by the Commission.

(b) Whenever the judgment obtained by an applicant is by default, stipulation, or consent, or whenever the action against the licensee was defended by a trustee in bankruptcy, the applicant, for purposes of this Article, shall have the burden of proving the cause of action for conversion of trust funds. Otherwise, the judgment shall create a rebuttable presumption of the conversion of trust funds. This presumption is a presumption affecting the burden of producing evidence. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 8; 1999-229, s. 9; 2001-487, s. 23(e).)

**§ 93A-20. Order directing payment out of fund; compromise of claims.**

Applications for payment from the Real Estate Education and Recovery Fund shall be heard and decided by a majority of the members of the Commission. If, after a hearing, the Commission finds the claim should be paid from the fund, the Commission shall enter an order requiring payment from the fund of whatever sum the Commission shall find to be payable upon the claim in accordance with the limitations contained in this Article.

Subject to Commission approval, a claim based upon the application of an aggrieved person may be compromised; however, the Commission shall not be bound in any way by any compromise or stipulation of the judgment debtor. If a claim appears to be otherwise meritorious, the Commission may waive procedural defects in the application for payment. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 9; 1999-229, s. 10; 2011-217, s. 13.)

**§ 93A-21. Limitations; pro rata distribution; attorney fees.**

(a) Payments from the Real Estate Education and Recovery Fund shall be subject to the following limitations:

- (1) The right to recovery under this Article shall be forever barred unless application is made within one year after termination of all proceedings including appeals, in connection with the judgment.

- (2) The fund shall not be liable for more than fifty thousand dollars (\$50,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in such transaction.
- (3) Payment from the fund shall not exceed in the aggregate twenty-five thousand dollars (\$25,000) for any one licensee within a single calendar year, and in no event shall it exceed in the aggregate seventy-five thousand dollars (\$75,000) for any one licensee.
- (4) The fund shall not be liable for payment of any judgment awards of consequential damages, multiple or punitive damages, civil penalties, incidental damages, special damages, interest, costs of court or action or other similar awards.

(b) If the maximum liability of the fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same transaction or to the same licensee, the amount for which the fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in such manner as the Commission, in its discretion, deems equitable. Upon petition of counsel for the Commission, the Commission may require all claimants and prospective claimants to be joined in one proceeding to the end that the respective rights of all such claimants to the Real Estate Education and Recovery Fund may be equitably resolved. A person who files an application for payment after the maximum liability of the fund for the licensee or transaction has been exhausted shall not be entitled to payment and may not seek judicial review of the Commission's award of payment to any party except upon a showing that the Commission abused its discretion.

(c) In the event an aggrieved person is entitled to payment from the fund in an amount which is equal to or less than the maximum amount of money which may be awarded in small claims court under G.S. 7A-210, the Commission may allow such person to recover from the fund reasonable attorney's fees incurred in effecting such recovery. Reimbursement for attorney's fees shall be limited to those fees incurred in effecting recovery from the fund and shall not include any fee incurred in obtaining judgment against the licensee. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 15; 1987, c. 516, ss. 10-13; 1999-229, s. 11; 2011-217, s. 14.)

#### **§ 93A-22. Repayment to fund; automatic suspension of license.**

Should the Commission pay from the Real Estate Education and Recovery Fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker, any license issued to the broker shall be automatically suspended upon the effective date of the order authorizing payment from the fund. No such broker shall be granted a reinstatement until the fund has been repaid in full, including interest at the legal rate as provided for in G.S. 24-1. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 14.; 2000-140, s. 19(b); 2001-487, s. 23(f); 2005-395, s. 15; 2011-217, s. 15.)

#### **§ 93A-23. Subrogation of rights.**

When the Commission has paid from the Real Estate Education and Recovery Fund any sum to the judgment creditor, the Commission shall be subrogated to all of the rights of the judgment creditor to the extent of the amount so paid and the judgment creditor shall assign all right, title, and interest in the judgment to the extent of the amount so paid to the Commission and any amount and interest so recovered by the Commission on the judgment shall be deposited in the Real Estate

Education and Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 15; 2001-487, s. 23(g); 2011-217, s. 16.)

**§ 93A-24. Waiver of rights.**

The failure of an aggrieved person to comply with this Article shall constitute a waiver of any rights hereunder. (1979, c. 614, s. 1.)

**§ 93A-25. Persons ineligible to recover from fund.**

No real estate broker who suffers the loss of any commission from any transaction in which he or she was acting in the capacity of a real estate broker shall be entitled to make application for payment from the Real Estate Education and Recovery Fund for the loss. (1979, c. 614, s. 1.; 2000-140, s. 19(b); 2001-487, s. 23(h); 2011-217, s. 17.)

**§ 93A-26. Disciplinary action against licensee.**

Nothing contained in this Article shall limit the authority of the Commission to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, s. 2.)

**§§ 93A-27 through 93A-31. Reserved for future codification purposes.**