

**Testimony of Patricia Jergenson, Executive Director, North Dakota Real Estate Commission, before the North Dakota Legislative Management Administrative Rules Committee, December 7, 2015.**

Good morning, my name is Pat Jergenson and I am the Executive Director of the North Dakota Real Estate Commission. At the previous meeting of this committee, one of the administrative rules proposed by the North Dakota Real Estate Commission, specifically NDAC Section 70-02-01-15(2)(d) relating to abandoned trust account deposits, was held over to this meeting.

The concern raised at the September 15 meeting was that some brokers have had difficulty determining what triggers the beginning of the three-year period referred to in the abandoned property statute, North Dakota Century Code Chapter 47-30.1. The abandoned property statute provides that the clock begins to run when the money becomes “payable or distributable.” There was also an issue of using language consistent with the abandoned property statute, namely using the term “presumed” rather than “deemed” abandoned, because “presumed” more often appears in the unclaimed property statute.

In response to that concern, I met with with Representative Scott Louser, John Walstad, Constance Hofland (Special Assistant Attorney General for the North Dakota Real Estate Commission, and two representatives of the North Dakota Association of Realtors (Jill Beck and Nancy Willis) on October 23, 2015.

The working group agreed to revised language. The key change is the addition of the last sentence clarifying that earnest money deposits are considered payable or distributable as of the closing date on the purchase agreement. The word “deemed” was also changed to “presumed.”

***Section 70-02-01-15(2)(d) Abandoned deposits.*** *Abandoned deposits in a broker’s trust account are subject to the laws governing abandoned property as provided in chapter 47-30.1 of the North Dakota Century Code. A deposit that has remained unclaimed for more than three years after it became payable or distributable is presumed abandoned by chapter 47-30.1 and shall be reported and delivered to the administrator of the unclaimed property division as provided by chapter 47-30.1. Earnest money deposits are considered payable or distributable as of the closing date on the purchase agreement.*

This revised rule was presented to the North Dakota Real Estate Commission at its regular meeting on November 19, 2015. The Commission moved to approve the revised rule, noting that the closing date on the purchase agreement would be the effective “payable or distributable” date even if the purchase agreement is cancelled.

We have also presented this revised rule to the unclaimed property division for review.

We request approval of NDAC 70-02-01-15(2)(d) as revised.

### **ADDITIONAL BACKGROUND INFORMATION:**

In response to some of the discussion at the last meeting of this committee, here is some background information on the proposed rule N.D.A.C. § 70-02-01-15 (2)(d).

#### **The Unclaimed Property Act applies to abandoned earnest money deposits in real estate broker trust accounts.**

The three-year requirement to clear old earnest money deposits is a requirement of the Unclaimed Property Act at N.D.C.C. Chapter 47-30.1.

The Unclaimed Property Act defines “intangible property” to include “deposits” (N.D.C.C. § 47-30.1-01(9)(a)), “holder” to include a person holding in possession of property belonging to another (N.D.C.C. § 47-30.1-01(7)), and “business association” to include an association for business purposes of two or more individuals (N.D.C.C. § 47-30.1-01(4)). According to this clear language, a broker’s earnest money deposits are covered by the Unclaimed Property Act.

The Unclaimed Property Act provides that all intangible property that has remained unclaimed by the owner for more than three years is presumed abandoned. N.D.C.C. § 47-30.1-02.

In addition to these prior two sections of the Unclaimed Property Act, another section of the Unclaimed Property Act specifically refers to intangible property held by agents and fiduciaries. Section 47-30.1-12 explains intangible property held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within three years after it has become payable or distributable, has communicated concerning the property or otherwise indicated an interest in the property.

The Unclaimed Property Division interprets the act as covering earnest money deposits in real estate broker accounts. This was confirmed with Linda Fisher, Deputy Commissioner of Operations for North Dakota Department of Trust Lands, before we drafted the rule, and was re-confirmed with current Unclaimed Property Administrator

Susan Dollinger. The crux of the issue is protection of the public. The earnest money deposit does not belong to the broker. If the deposit is unclaimed for three years or more and is presumed abandoned according to the Unclaimed Property Act it should go to the Unclaimed Property Division so they can try to reunite the owners with their money. The deposit does not disappear when it goes to the Unclaimed Property Division, much the opposite, it then shows up on the lists and is more accessible than when it was sitting in a trust account of a real estate broker.

Dollinger said that when they get earnest money deposits turned over to Unclaimed Property it comes with all the names associated with the earnest money deposits, so all the parties that may have a claim to the property are identified and have a chance to see their names on the lists of unclaimed property owners. Dollinger says there have been situations that more than one party tries to claim the deposit, and ownership needs to be resolved, usually by the courts.

To clarify an often misconception about unclaimed property, the money does not become the property of the state. The interest from the money is used to fund education but the principle remains untouched until it is claimed. As stated on the website of the Unclaimed Property Division, “[t]he State guarantees that this money will be held forever for the rightful owner or the owner's heirs.”

**The proposed administrative rule does not expand jurisdiction of the North Dakota Real Estate Commission and is not attempting to “enforce” the Unclaimed Property Act.**

The proposed rule simply refers back to the Unclaimed Property Act, concerning deposits of other people’s money in trust accounts. It is within the jurisdiction of the Commission to make rules concerning deposits in trust accounts and broker’s custody of other people’s money. N.D.C.C. § 43-23-14.1.

The proposed rule would not result in the Commission enforcing the Unclaimed Property Act. Violation of the Unclaimed Property Act could result in a \$100 per day fine or class B misdemeanor charges for willful refusal to deliver property to Unclaimed Property. This proposed rule is not attempting to have the Commission enforce the Unclaimed Property Act.

The Commission conducts audits of trust accounts. It is in these audits that the Commission becomes aware of earnest money deposits in trust accounts that have been sitting for long periods of time in trust accounts with no activity. For example, auditors in 2011 found funds in a trust account with no activity for long periods of time, some in excess of 20 years. The auditors then direct the broker to take care of these unclaimed deposits. What this rule does is clarify for the brokers to turn over any

unclaimed property, as that term is defined by the Unclaimed Property Act, to Unclaimed Property. The objective of this rule to protect the public that otherwise would have deposits in a broker's account that they are unable to access and most likely are not longer aware exist. Once the amount is turned over to Unclaimed Property, there is a chance the owners will see the property in the lists of unclaimed property and come forward to make a claim.

**Administrative rules of real estate commissions in other states require abandoned deposits be turned over to unclaimed property.**