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July 23, 1974

Roberta Weil, Commissioner

Business Regulation

Harrison B. Wetherill, Jr., Asst.

Attorney General

Buyer Protection Plan

I have received your request for an opinion as to whether a Portland real estate brokerage firm (hereinafter the firm) may offer a buyer protection plan (hereinafter the plan) to purchasers of property where the cost of the plan is taken out of the sales commission received by the firm. It has taken me some time to respond to your request because I felt that I should obtain the views of the Real Estate Commission on this question prior to making my response. I have now, as you know, corresponded with the Commission.

Ignoring any possible insurance implications, the firm may offer such a plan and payment for the plan may come out of the firm's sales commission.

On each sale of property, the firm intends to pay 1/2 of 1% of the sales price to Homeowners' Repair Service, Inc. in return for which Homeowners will enter into a warranty or service contract with the buyer of the property. The contract will cover heating, plumbing, roofing, and other specified items for a period of one year. At present the firm is charging buyers who want to be covered by the plan for the cost of the plan, however, the firm would like to offer the plan free of charge, payment of the cost of the plan to come out of the commission received on the sale of the property.

Under 32 M.R.S.A. § 4003, "[i]t shall be unlawful for any licensed broker . . . to offer . . . or pay, directly or indirectly, any part or share of his commission . . . arising . . . from any real estate transaction to any person who is not a licensed broker or salesman, or a person acting in a capacity which exempts him under section 4001, in consideration of services performed or to be performed by such unlicensed person."

The above prohibition against sharing commissions with unlicensed persons is intended to insure that license privileges are only performed by licensed individuals and that such privileges are not delegated or contracted out to unlicensed persons. The term "services" as used in 32 M.R.S.A. § 4003, refers to those services performance of which requires a real estate broker's or salesman's license. Since the Buyer Protection Plan under consideration does not involve the unlicensed practice of real estate

by Homeowners, the firm may pay for such service as an item of overhead and this does not constitute the sharing of commissions in consideration of services performed as contemplated by 32 M.R.S.A. § 4003.

This opinion is contrary to the holding of 1961-62 Atty. Gen. Rep. 69, and that earlier opinion is hereby overruled. Further, it is the opinion of this office that, under the holding of Small v. Maine Bd. of Examiners in Optometry, 293, A.2d 786, Real Estate Commission Regulation No. 22 is invalid and unenforceable since it purports to proscribe and impose sanctions for conduct not reached by any legislative prohibition.

HBWJr/mf

AN INFORMAL OPINION