

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE  
COMMISSION  
V.

HUBURN P. BENJAMIN  
RESPONDENT

AND

CLAIM OF RUTH F. JOHNSON  
AGAINST THE MARYLAND  
REAL ESTATE COMMISSION  
GUARANTY FUND

\* BEFORE KIMBERLY A. FARRELL,  
\* ADMINISTRATIVE LAW JUDGE,  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No: DLR-REC-24-07-48826  
\* REC CASE NO: 2005-RE-122  
\*

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated June 9, 2008, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of July, 2008,

ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

- D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.

MARYLAND STATE REAL ESTATE COMMISSION

7/21/08  
Date

By: *Katherine J. Connelly, Exec. Director*  
Anne S. Cooke, Commissioner

MARYLAND REAL ESTATE	* BEFORE KIMBERLY A. FARRELL,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE OF
HUBURN P. BENJAMIN, RESPONDENT	* ADMINISTRATIVE HEARINGS
and the	* OAH NO.: DLR-REC-24-07-48826
CLAIM OF RUTH F. JOHNSON AGAINST	* COMPLAINT NO.: 05-RE-122
THE MARYLAND REAL ESTATE	*
COMMISSION GUARANTY FUND	*

\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On September 14, 2004, Ruth F. Johnson (Claimant) filed a complaint and Guaranty Fund (Fund) claim with the Maryland Real Estate Commission (REC), seeking reimbursement from the Fund for losses allegedly incurred as a result of the conduct of Huburn P. Benjamin<sup>1</sup> (Respondent), a licensed real estate agent. On September 29, 2006, the Commission filed related regulatory charges against the Respondent.

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<sup>1</sup> In several exhibits, the Respondent's name has been transposed, appearing sometimes as Benjamin Huburn. The Respondent's proper name is Huburn P. Benjamin.

On June 21, 2007, an Administrative Law Judge from the Maryland Office of Administrative Hearings (OAH) held a hearing in this matter on the regulatory charges as well as the Fund claim. On November 9, 2007, a Proposed Decision was issued in this case.<sup>2</sup> After due consideration, the REC remanded the matter to OAH by Order dated December 11, 2007, with instructions to conduct a *de novo* hearing on both the regulatory charges and the Fund claim.

In accordance with the remand Order, I held a *de novo* hearing on March 11, 2008, at OAH offices located at 11101 Gilroy Road, Hunt Valley, Maryland. Assistant Attorney General Jessica B. Kaufman appeared on behalf of the REC. Assistant Attorney General Hope Miller represented the Fund. The Claimant was represented by David Alexander, Esquire. The Respondent represented himself.

The hearing was conducted pursuant to section 17-324 of the Business Occupations and Professions Article, Annotated Code of Maryland (2004).<sup>3</sup> Procedure in this case is governed by the Administrative Procedure Act, OAH's Rules of Procedure, and the REC's hearing regulations. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2007); Code of Maryland Regulations (COMAR) 28.02.01; COMAR 09.11.03 and 09.01.03.

### ISSUES

1. Did the Respondent violate § 17-322(b)(3) of the Business Occupations Article by, directly or through another person, willfully making a misrepresentation or knowingly making a false promise?
2. Did the Respondent violate § 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
3. Did the Respondent violate COMAR 09.11.02.01C by failing to protect the public against fraud, misrepresentation, or unethical practices in the real estate field?

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<sup>2</sup> The Proposed Decision recommended dismissal of the action without prejudice based on procedural due process/notice issues. Those issues were mooted by the Respondent's personal participation in the hearing before me.

<sup>3</sup> The short form "Business Occupations Article" will be used in this Proposed Decision.

4. Did the Respondent violate COMAR 09.11.02.02A by failing to protect and promote the interests of the Claimant while serving as her real estate agent?
5. If the Respondent violated any of the cited provisions, what, if any, penalty should be imposed?
6. Did the Claimant suffer an actual monetary loss compensable by the Fund as a result of the conduct of the Respondent and, if so, what is the amount of the loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted seven exhibits on behalf of the REC:

- |         |  |
|---------|--|
| MREC #1 | Notice dated February 7, 2008, for hearing scheduled March 11, 2008  |
| MREC #2 | Notice dated February 7, 2008, for hearing scheduled March 11, 2008 sent to the Respondent in care of Fairfax Realty, Inc., returned to OAH by U.S. Postal Service |
| MREC #3 | Remand transmittal with attached Remand Order, Proposed Decision from the original hearing, and Statement of Charges and Order for Hearing                         |
| MREC #4 | Business records of the REC regarding the Respondent's licensing history   |
| MREC #5 | Affidavit of Steven Long, dated December 6, 2007   |
| MREC #6 | Correspondence from the Respondent dated February 18, 2008, addressed to Assistant Attorney General Jessica Kaufman  |
| MREC #7 | REC Report of Investigation, with attachments individually numbered 1-18   |

I admitted two exhibits on behalf of the Claimant:

- |       |   |
|-------|---|
| CL #1 | Photocopy of the Respondent's business card   |
| CL #2 | Photocopy of check 356002576, drawn on the account of Fountainhead Title Group in the amount of \$2,000 payable to William Guzman in care of the Respondent |

Neither the Fund nor the Respondent offered any additional exhibits into evidence.

#### Testimony

The Claimant was called as a witness by the REC in presenting its evidence on the regulatory charges; the Claimant also testified in her own right on her claim against the Fund. In addition, the REC called Jack Mull, Investigator, REC, as a witness. The Respondent testified on his own behalf. He did not present any other witnesses.

## FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Respondent was a licensed real estate agent assigned REC registration number 05-576309.
2. The events at issue revolve around the purchase of a single-family home located at 7103 Murphy Court, Temple Hills, Maryland.
3. In the summer of 2003, the Claimant was a California resident seeking to move to Maryland. Looking for a real estate agent to assist in purchasing property for a home in Maryland, the Claimant found the Respondent through the Yellow Pages.
4. The Claimant entered into a Buyer's Broker agreement with RE/MAX Professionals authorizing RE/MAX to act as her agent in locating and negotiating to purchase real estate in Maryland. The original date of the contract is not legible. It was overwritten with August 1, 2003, as the date of signing. The Respondent signed the contract on behalf of RE/MAX. The contract was in effect from August 10, 2003 until December 3, 2003.
5. On or about August 13, 2003, the Claimant and the Respondent went to view the Murphy Court property. They found it to be in need of extensive repair and renovation; however the Claimant decided that she would like to make an offer on the property.
6. An offer to purchase was prepared and submitted to the seller, the Department of Veteran's Affairs (VA), on August 21, 2003. On the contract the Respondent is identified as the "principal broker or authorized representative" for the Claimant.
7. The VA accepted the Claimant's offer on August 26, 2003.
8. On August 27, 2003, a Uniform Residential Appraisal Report was prepared regarding the

property. The report indicated among other things that there was a problem with mold in the basement, which would have to be removed.

9. The Claimant received a loan commitment letter dated September 3, 2003. Final approval of the loan was contingent on several conditions, including removal of the mold in the basement.
10. The Claimant spoke with the Respondent regarding the conditions. He told the Claimant that the mold removal would not be a problem because he was a contractor and he could get the problem taken care of. William Guzman was hired to take care of the mold in the basement. His work was approved by the lender's inspector and the financing was approved.
11. The Respondent asked the Claimant for \$2,000 to pay for the mold removal. The Claimant paid the Respondent \$2,000 in cash to reimburse William Guzman. William Guzman was not licensed by the Maryland Home Improvement Commission (MHIC) to perform any type of home improvement work nor was the company he said he was associated with – WR Construction.
12. To keep the mold from returning, it was necessary to install a sub-floor pressure relief system and a new sump pump. The Respondent arranged for Affordable East Coast Waterproofing, Inc. to perform the work at a cost of \$4,500. This company was licensed with the MHIC.
13. The Claimant was traveling back and forth between California and Maryland. She could not pay much up front because her money was tied up in the California property she was selling. The Respondent agreed to pay for some items until the Claimant could reimburse him, which would occur after closing on her California property.

14. On September 15, 2003, the Claimant had a home inspection performed. The report identified a number of items that needed repair or renovation.
15. In discussing the items that needed repair or renovation at the property, the Respondent advised the Claimant that he was a licensed contractor. Because the Respondent had been helpful to the Claimant in purchasing the property and in arranging for prompt remediation of the mold problem which threatened her financing, the Claimant believed the Respondent to be trustworthy and relied on his representations about being a contractor. Consequently, on October 17, 2003, the Claimant and the Respondent entered into a written contract for “the total renovation” of the Murphy Court property. The contract noted that the agreement was for a maximum allowance of \$20,000, and contemplated a downward adjustment if the project could be completed for less money. The Respondent signed the contract on a signature line identifying him as “Huburn Benjamin, Contractor.”
16. The Respondent has never been licensed in any capacity by the MHIC.
17. On October 22, 2003, settlement occurred on the Murphy Court property. Prior to the settlement, the Respondent requested an \$8,000 payment towards labor and materials on the home improvement contract. The Claimant provided the Respondent with a starter check from a newly opened Bank of America account.
18. At closing, the cost of the mold removal was to be paid by the seller, the VA. Accordingly, Fountainhead Title Group, after obtaining information from the Respondent, issued a check for \$2,000 to William Guzman in care of the Respondent. The Respondent never refunded any money to the Claimant although he was paid twice for the mold removal.

19. On Thursday, October 23, 2003, the Respondent contacted the Claimant. He claimed that the bank would not accept her starter check and he requested that she transfer \$8,000 directly into his account. The Claimant transferred \$8,000 as requested. The Respondent assured the Claimant that he would return her check.
20. On Monday, October 27, 2003, the Respondent deposited the Claimant's original \$8,000 starter check into his own account. He had no permission to do so.
21. On October 30, 2003, the Claimant and the Respondent met. When the Claimant asked for her check, the Respondent replied that he had forgotten to bring it. The Respondent further requested reimbursement for the \$4,500 he had advanced for the basement waterproofing. The Claimant became upset, and told the Respondent she believed that money was included in the \$20,000 home improvement project cap. Despite her displeasure, the Claimant paid the Respondent an additional \$4,500.
22. In early November 2003, the Claimant received a bank statement and learned for the first time that the Respondent had cashed her \$8,000 starter check.
23. During a visit to the Murphy Court property to check on the progress of the home improvement work, the Claimant discovered that the Respondent had removed a refrigerator, a stove, a washer and dryer, a utility sink and a kitchen sink. These were items that the Claimant intended to use. The Respondent had been instructed by the Claimant to move these items to the basement. He had no permission to remove the appliances from the property. He did not return the appliances although the Claimant demanded that he do so.
24. The Claimant sent a letter on November 22, 2003 terminating the home improvement contract and ordering the Respondent and his workers off the property.

25. Very little home improvement work was completed under the home improvement contract. The Claimant hired licensed contractors to finish work left incomplete by the Respondent.
26. On September 14, 2004, the Claimant filed a complaint and claim form with the REC.
27. Sometime prior to October 12, 2004, the Respondent was advised of the complaint and claim against him and he submitted a written response to the REC on October 12, 2004.
28. The Respondent's real estate license was placed on inactive status on March 31, 2005.
29. On November 21, 2005, the REC requested that the Division of Investigative Services undertake an investigation of this matter.
30. The Respondent's real estate license expired November 26, 2006.

## DISCUSSION

### *General Discussion*

The REC has charged the Respondent with violating the following statute and regulations:

§ 17-322. Denials, reprimands, suspensions, revocations, and penalties – Grounds.

...

(b) *Grounds.*- Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

(3) directly or through another person willfully makes a misrepresentation or knowingly makes a false promise;

...

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings[.]

...

The REC also charged the Respondent with violating the REC's Code of Ethics, COMAR 09.11.02. The specific ethics provisions the Respondent is alleged to have violated are COMAR 09.11.02.01C and 09.11.02.02A:

.01 Relations to the Public

...  
C. The Licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

.02 Relations to the Client.

A. In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

Preliminarily, I will make some general observations regarding the testimony and credibility of the main witnesses – the Claimant and the Respondent. Both witnesses struggled with recalling events that occurred almost five years ago. It was clear that time had blurred the details for both of them. Still, from the Claimant I got the impression that she was doing her best to put things in a light that was extremely favorable to her claim, but not that she was making things up. Her testimony at one point was inaccurate regarding the purpose of a particular check and she readily conceded her mistake when it was pointed out to her. My impression of the Respondent's testimony was very different.

When testifying about what he had done for the Claimant, the Respondent made broad statements, such as a claim that he had designed her kitchen for her. When other parties attempted to cross-examine on the statement, he became evasive and argumentative. He tried to deny saying some of the things he had said only moments before, and quarreled about trivial semantics which were inconsequential. Some of the Respondent's testimony was circular and rambling. He

remembered details that were favorable to his position, but when asked about major points that might not have been favorable he would answer that he didn't remember or would say that what the questioner asked "might be true."

Of critical importance in this case were the facts surrounding the cashing of the \$8,000 check the Claimant gave the Respondent. The Respondent insisted that he did not cash the check immediately, stating that he held on to the check "for a good while – maybe for a couple weeks." When bank records showed that the check, written on Thursday, October 23, 2003 was deposited into his account on Monday, October 27, 2003, the Respondent testified that his "story" "doesn't hold water," but he still clung to the assertion that he had been instructed to deposit that check in his account. Also, although it is difficult to capture in words, the Respondent made faces to me which I interpreted as him trying to ingratiate himself to me. The looks seemed intended to convey the idea that he and I were in this together and that I would surely be sympathetic to his having to put up with the others in the room. Towards the end of the hearing, the Respondent began making arguments that were completely without factual basis, suggesting that the Claimant had planned from the beginning to have a failed home improvement contract with him so that she could get money out of him. In summary, I found the Respondent's testimony to be illogical and lacking in credibility.

*Violation of Business Occupations Article § 17-322(b)(3) and (25)*

Based on the Findings of Fact, I find that the Respondent violated § 17-322(b)(3) of the Business Occupations Article by directly making willful misrepresentations. The Respondent misrepresented to the Claimant that he was a licensed home improvement contractor. He also misrepresented to the title company at closing that the \$2,000 due from the VA should be paid to William Guzman in care of the Respondent. The Respondent had already obtained \$2,000 from

the Claimant to pay for the mold removal. The result was that he received \$2,000 twice to pay for the same work. The Respondent also represented to the Claimant that the bank would not cash her check for \$8,000. He demanded that she transfer \$8,000 directly into his account, which she did. The Respondent then cashed the \$8,000 check without permission and, a few days later, when the Claimant asked him directly to return it to her at a face-to-face meeting, he told her he had forgotten the check. This resulted in the Respondent gaining \$16,000 from the Claimant when he should only have had \$8,000.

The same misrepresentations discussed above represent violations of § 17-322(b)(25) of the Business Occupations Article. Misleading, lying to, and double-charging a client demonstrate bad faith and untrustworthiness, and constitute dishonest, fraudulent, or improper dealings.

*No Violation of COMAR 09.11.02.01C*

The REC charged the Respondent with violating COMAR 09.11.02.01C. To assess this allegation, it is important to consider the ethical canon in context. Ethics for those holding licenses from the REC are divided into different topic areas: Relations to the Public, Relations to the Client, and Relations to fellow Licensees. When read as a whole and viewed in its place within the ethics regulations, this allegation does not seem to be a good fit to the Respondent's conduct. This canon seems designed to require the Respondent to help police others in the real estate field. It does not seem designed to address the individual's personal conduct. This is in sharp contrast to COMAR 09.11.02.02A, which is clearly intended to direct the personal conduct of individual agents. The REC argued that COMAR 09.11.02.01C applied because the Respondent (as a real estate agent) violated his obligation to protect the public at large from unethical practices in the real estate field

by engaging in home improvement work for one client when he was not licensed to do so. In my view the regulation simply was not intended to cover this conduct.

The REC further argued that the Respondent failed to assist the commission by failing to respond to Mr. Mull during the REC's investigation. I do not find that the REC has proven this allegation. The conduct complained of occurred from August 2003 through November of 2003. The Claimant sent the Respondent a letter terminating their agreement regarding home improvement on November 22, 2003. Both the Respondent and the Claimant agree they had no further contact with each other. The Claimant filed a complaint and Fund claim on September 14, 2004, nearly a year later. When the REC advised the Respondent of the complaint and requested an explanation, the Respondent provided a written response to the REC on October 12, 2004, in which he denied misconduct. There is no evidence that the REC made any further attempt to contact the Respondent until more than a year later - sometime after November 16, 2005, the date the REC requested an investigation. The report of investigation gives details about Mr. Mull's efforts to make contact with the Respondent, but does not give any information about when the efforts were made. Obviously they were not made until after the investigation was opened. Probably no attempt at further contact with the Respondent was made until April or May of 2006. That is when Mr. Mull interviewed the Claimant about her interaction with the Respondent. The Respondent's license went to inactive status on March 31, 2005. The Respondent's uncontradicted testimony was that he moved out of State and that he heard nothing further from the REC until 2008 when the REC tracked him down in New Mexico. The facts proven do not support a charge of breaching an obligation to assist the REC.

*Violation of COMAR 09.11.02.02A*

The REC also charged the Respondent with violating COMAR 09.11.02.02A, which charges a real estate agent, upon accepting employment, to “protect and promote the interests of the client.” The facts of this case amply demonstrate that the Respondent breached this duty. I find the REC has proven this allegation.

*Appropriate Regulatory Sanction*

Available regulatory sanctions are outlined in Business Occupations Article § 17-322(b) and (c). They include denying a license to any applicant, reprimanding any licensee, or suspending or revoking a license if the Licensee commits any one of a number of listed infractions. Dues to his violations of § 17-322(b)(3) and (25), the Respondent is subject to these sanctions. In addition, the statute provides the following:

- (c) *Penalty.* -- (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.
- (2) To determine the amount of the penalty imposed, the Commission shall consider:
  - (i) the seriousness of the violation;
  - (ii) the harm caused by the violation;
  - (iii) the good faith of the licensee; and
  - (iv) any history of previous violations by the licensee.
- (3) The Commission shall pay any penalty collected under this subsection into the General Fund of the State.
- (4) The Commission may not impose a fine based solely on a violation of subsection (b)(35) of this section.

Business Occupations Article § 17-322(c).

The violations committed in this case are serious. The Claimant was lulled into trusting the Respondent to do home improvement contracting work for her due to his position of trust as her real estate agent. He misrepresented his licensing status with the MHIC. He took thousands of dollars that belonged to the Claimant, while directly misrepresenting the situation to her. The Claimant has been missing money that is rightfully hers for nearly five years now. In addition,

she was inconvenienced by having to locate and hire other contractors and by pursuing a claim with the Fund. Because the Respondent's conduct involved direct misrepresentations and arranging on at least two occasions to obtain or keep money that belonged to the Claimant, I find that the Respondent's level of good faith in these dealings was low. This conclusion is further bolstered by the Respondent's lack of credibility during the hearing, as discussed above. No evidence of previous violations was presented.

The REC recommended a civil penalty of \$4,000 calculated as \$1,000 for each of the four charged violations. I found that the REC only proved three of the charged violations. I do find that assessing \$1,000 for each violation is a reasonable formula for determining a civil penalty in this case and accordingly I recommend a \$3,000 civil penalty.

The REC also requested that the Respondent's license be revoked. The REC acknowledged that the Respondent's license is currently expired, but suggested that a revocation could be noted against the old Maryland license. No authority was cited for the proposition that a revocation may be entered against an expired license. Business Occupations Article § 17-322 permits the REC to "suspend or revoke a license if the applicant or licensee" commits one of the enumerated infractions. The Respondent is not an applicant. Neither is he currently a "licensee" as that term is defined in Business Occupations Article § 17-101(k), which defines a licensee as "a licensed real estate broker, a licensed associate real estate broker, of a licensed real estate sales person." Because the Respondent is neither an applicant nor a licensee, I find no statutory authority for revoking the Respondent's expired license.

### *Guaranty Fund Claim*

The Claimant bears the burden of proof in her Claim against the Fund. Business Occupations Article § 17-407(e) (2004). For the reasons set forth below, I conclude that the Claimant has met her burden on a portion of the claim.

Claims for reimbursement from the Fund are governed by Business Occupations Article § 17-404 (2004), which states in pertinent part as follows:

§ 17-404. Claims against the Guaranty Fund.

(a) *In General.* -- (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson...

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
2. that constitutes fraud or misrepresentation.

COMAR 09.11.03.04 further provides with respect to claims against the Fund as follows.

A. A Guaranty Fund claim shall be based on the alleged misconduct of a licensee.

B. For the purposes of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

In her claim as originally filed, the Claimant sought \$26,850 from the Fund. That amount broke down as follows:

\$2,000	Cash given to Respondent October 17, 2003 for mold removal
\$8,000	Check given to Respondent October 22, 2003 for home improvement
\$8,000	Direct transfer to Respondent's bank account
\$4,500	Check given to Respondent October 30, 2008 for basement waterproofing
\$2,000	Check given to Respondent by Fountainhead for reimbursement of mold removal
\$ 900	New refrigerator freezer
\$ 800	New electric range
\$ 200	Washer
\$ 200	Dryer
\$ 100	Concrete double utility sink
<u>\$ 150</u>	Stainless steel kitchen sink
\$26,850	

Although there is no evidence that the claim was ever amended, and no request to do so at the hearing, the Claimant argued a different breakdown for reimbursement at the hearing. Both requests exceeded \$25,000, which is the maximum amount that may be recovered for any one claim. Business Occupations Article § 17-404(b). The amount argued at the hearing came to a total of \$39,100. The difference between the two totals resulted from the Claimant's addition of amounts paid to contractors for work done on the property after the Claimant's falling out with the Respondent.

I am declining to consider those additional amounts for several reasons. First, they were not a part of the original claim and there is no indication that the claim was ever amended. Further, the written agreement between the Claimant and the Respondent for home improvement work that was entered into evidence was very general. There was testimony that a specific task list was created, but that the Claimant did not keep a copy. After things fell apart the Claimant

tried to recreate the task list and noted as to each task whether it was done at all and whether it was done satisfactorily. Although I accept that it was a good faith effort on the part of the Claimant, I do not accept that the list is an accurate representation of the actual contract made between the Respondent and the Claimant. I also believe that, up until things went awry, transactions between the Claimant and the Respondent were very fluid and not well memorialized in writing. I believe the project was adjusted on an ongoing basis. I am not persuaded that the work subsequently done by other contractors matches the original agreement between the Respondent and the Claimant.

In reviewing the statute authorizing claims against the Fund, claims are authorized based on an act or omission “in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery” or an act or omission “constituting fraud or misrepresentation.” Business Occupations Article § 17-404(a)(2). Even if I looked past the original claim to the newly presented dollar amounts and even if I found there was a credible preponderance of the evidence supporting the notion that the subsequently contracted work represented a match to the originally contracted work, I don’t believe the language of the statute authorizes the Claimant to recover for this type of loss.

Turning then to the original claim, the Claimant was not supposed to have to pay for the mold removal. The VA was responsible for that expense. The title company was supposed to issue a check for payment of that item. The Claimant is entitled to recover the \$2,000 the Respondent collected from her ostensibly to pay for mold removal. The Claimant, however, has included \$4,000 in her claim for this item, counting both the \$2,000 cash she gave the Respondent and also the \$2,000 check issued by the title company as losses she should recover. Either the Respondent should not have gotten \$2,000 from the Claimant in the first place, or he

should have given the \$2,000 settlement check to the Claimant, but either way the Claimant is out \$2,000, not \$4,000.

The Claimant is also entitled to reimbursement for the \$8,000 check she sent the Respondent as well as the \$8,000 she transferred into his account. Although some modest amount of that total may have actually gone toward work performed at the house, I find based on the Claimant's testimony that the amount would be *de minimis* and it is appropriate to award the Claimant the full \$16,000.

The Claimant listed \$4,500 in her claim for basement waterproofing. There is no dispute that the waterproofing was done and there is no dispute that the company that performed the work was MHIC licensed. If the work was sub-standard, as alleged by the Claimant, that matter should have been addressed through the MHIC. It is not a loss that fits within the statutory language covering REC Fund claims. There is no evidence that the loss suffered, if any, was attributable to the Respondent.

Finally, the claim included \$2,350 for appliances. I do not find this portion of the claim supported by a preponderance of the evidence. No receipts were offered to show the value of the appliances. The round figures used in the claim indicates the numbers were estimates and I have no evidence as to how the numbers were determined. There was conflicting evidence about which appliances were removed from the property, why they were removed, and whether some of the appliances were new or used. The Claimant bears the burden of proof and I find that she did not provide evidence to adequately support this portion of her claim. I do believe that some appliances were removed from the property at the Respondent's direction without the Claimant's permission, but I am not able to determine the amount of the loss.

I find that the Claimant should be reimbursed \$18,000 by the Fund. This total is reached by adding the allowable and proven items from the Claimant's original claim, as highlighted in bold below:

<b>\$2,000</b>	<b>Cash given to Respondent October 17, 2003 for mold removal</b>
<b>\$8,000</b>	<b>Check given to Respondent October 22, 2003 for home improvement</b>
<b>\$8,000</b>	<b>Direct transfer to Respondent's bank account</b>
\$4,500	Check given to Respondent October 30, 2008 for basement waterproofing
\$2,000	Check given to Respondent by Fountainhead for reimbursement of mold removal
\$ 900	New refrigerator freezer
\$ 800	New electric range
\$ 200	Washer
\$ 200	Dryer
\$ 100	Concrete double utility sink
\$ 150	Stainless steel kitchen sink.

#### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Business Occupations Article §§17-322(b)(3), and (25) (Supp. 2007) and COMAR 09.11.02.02A by misleading the Claimant, and obtaining funds which he was not entitled to collect at a time when he was acting in a licensed capacity assisting her with the purchase of residential real estate located in the State of Maryland. These actions demonstrated bad faith and untrustworthiness, as well as dishonest and improper dealings. The Respondent failed to protect and promote the interests of the Claimant.

I conclude as a matter of law that the Respondent did not violate COMAR 09.11.02.01C, because his actions do not fit within the scope of the regulation.

I conclude as a matter of law that the Respondent is subject to a monetary penalty for violations of Business Occupations Article § 17-322(c) (Supp. 2007), and that \$3000 is an appropriate penalty.

I conclude that the Respondent is not subject to revocation of his expired license.  
Business Occupations Article §§ 17-322 and 17-101 (Supp. 2007).

Finally, I conclude that the Claimant is entitled to payment of \$18,000 from the Real Estate Guaranty Fund pursuant to Business Occupations Article § 17-404 (2004).

**RECOMMENDED ORDER**

I **RECOMMEND** that the REC:

**ORDER**, that the Respondent violated §§ 17-322(b)(3) and (25) of Business Occupations Article and COMAR 09.11.02.02A, and be it further,

**ORDERED**, that the Respondent pay a civil statutory penalty to the REC in the amount of \$3,000; and be it further,

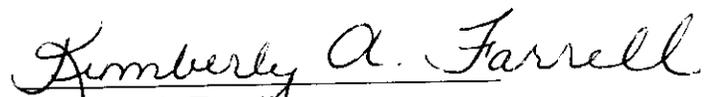
**ORDERED**, that the Respondent did not violate COMAR 09.11.02.01C; and be it further,

**ORDERED**, that the Claimant be reimbursed \$18,000 from the Fund to compensate her for actual losses that she sustained because of the conduct of the Respondent, and be it further,

**ORDERED**, that the records and publications of the REC reflect this decision.

June 9, 2008  
Date Decision Mailed

KAF  
#97593

  
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Kimberly A. Farrell  
Administrative Law Judge