REAL ESTATE COMMISSION: Cannot demand money put in escrow on guaranteed first mortgages.

April 24, 1943

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Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of April 21, 1943, which reads as follows:

> "May the Commission have an opinion on the following.
>
> "More than one licensee in the metropolitan areas are advertising in classified advertisements for sale 'Guaranteed First Mortgages'.
>
> "Has the Commission the power and authority to summons for hearings such parties advertising these Guaranteed First Mortgages and make inquiry as to what the Guarantee consists of or if it be possible to have them change the advertisement to state to what extent the Guarantee covers.
>
> "The St. Louis Real Estate Board has adopted a requirement that if any Realtor advertises Guaranteed First Mortgages that he must deposit with some responsible escrowee the sufficient amount to cover the guarantee. Would it be possible for this Commission to adopt the same rule to protect the General public."

In the above request you state that several licensees are advertising in classified advertisements for sale of "Guaranteed First Mortgages." The word "guaranty" is defined in Border Nat. Bank of Eagle Pass, Tex., v. American Nat. Bank of San Francisco, Cal., 282 F. (Circuit Court of Appeals, Fifth Circuit) 73, l. c. 77, as follows:

> "A guaranty is a promise to answer for the payment of some debt, or the performance of some obligation, in case of the default of another person, who is in the first instance liable for such payment or performance. * * * * * * "

Also in the case of Kelly-Springfield Tire Co. v. Hamilton et al, 91 S. W. (2d) (Mo. App.) 193, l. c. 195, the word was defined as follows:

> "A guaranty is a collateral agreement for the performance of the undertaking of another. In other words, guaranty is a separate contract which imposes different responsibilities than those imposed in the contract to which it is collateral."

In other words, guaranteed first mortgages are mortgages that are covered by separate agreement which binds the guarantor to assume the performance of the undertaking of another.

In your request you also inquire:

> "Has the Commission the power and authority to summons for hearings such parties advertising these Guaranteed First Mortgages and make inquiry as to what the Guarantee consists of or if it be possible to have them change the advertisement to state to what extent the Guarantee covers?"

As set out above, the guaranty may be only the personal guaranty of a guarantor that if the first mortgage is not paid when due he will pay the same. There is no false representation until he has failed to pay the amount of the first mortgage, upon the failure of the maker thereof to pay same when it becomes due. Of course, under the authorities set out in Section 10, par. (a) of the Missouri Real Estate Commission Act, the Commission may, upon its own motion, investigate the business transactions of licensees. Section 10, par. (a) of this Act, (Laws of Missouri, 1941, page 428) reads as follows:

> "Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others."

Under par. (a), in order to revoke, or suspend, any license the licensee must make substantial misrepresentations or false promises in the conduct of his business. The fact that he guarantees the payment is not a substantial misrepresentation unless he refuses to pay the mortgage under his guaranty when the same is not paid under the terms of the mortgage or deed of trust. In order to hold that the licensee is guilty of making substantial misrepresentations, or false promises, the fraud must be shown either by a concealment of certain facts or actual misrepresentation. It was so held in the case of Klika v. Albert Wenzlick Real Estate Co. et al., 150 S. W. (2d) 18, par. 6, where the court said:

> " * * * * It has also been held that fraud may be shown by concealment with intent to defraud, as well as by misrepresentation, if such concealment is material in the transaction by inducing one to act to his loss. Williams v. Hall, Mo. App., 261 S. W. 938, 940."

We find no authorization which would allow the Commission to cause the sellers of guaranteed first mortgages to change the advertisement in order that it would show to what extent the guaranty covers. It is true that under Section 4 of the Missouri Real Estate Commission Act the

following authority is granted:

> " * * * Said commission may do all things necessary and convenient for carrying into effect the provisions of this act, and may from time to time promulgate necessary rules and regulations compatible with the provisions of this act. * * * * * * * * * * * * * *."

We find no provision which would allow the Real Estate Commission to make a rule and regulation as to the mode and method of inserting advertisements. In your request you also state that the St. Louis Real Estate Board has adopted a requirement that if any realtor advertises, "Guaranteed First Mortgages" he must first place in escrow with some responsible depositary a sufficient amount to cover the guaranty. This is purely a private contract between the realtor and the St. Louis Real Estate Board, and, under its charter and by-laws it is probably provided that the members should follow the rules and regulations as set out by the St. Louis Real Estate Board. Such is not the case under our statutory law, and it would not be possible for the Missouri Real Estate Commission to adopt the same rule to protect the general public.

## CONCLUSION

It is, therefore, the opinion of this department, that the Commission has the power and authority to summons for hearing parties advertising, "Guaranteed First Mortgages" and make inquiry as to what the guaranty consists of, but it is not possible for the Missouri Real Estate Commission to have them change the advertisement so as to state to what extent the guaranty covers.

It is further the opinion of this department, that if any licensee advertises, "Guaranteed First Mortgages" the Missouri Real Estate Commission has no authority to order him to place in escrow with some responsible depositary a

sufficient amount to cover his guaranty.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

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ROY McKITTRICK
Attorney General of Missouri

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