

June 10, 2005: Manufactured Housing Consumer Protection Bonds

Arturo Jaramillo
RLD Superintendent
2550 Cerrillos Road
Santa Fe, NM 87505

Re: **Request for Opinion—Manufactured Housing Consumer Protection Bonds**

Dear Mr. Jaramillo:

You have requested our advice regarding the validity of the Manufactured Housing Division's ("Division") current regulations on consumer protection bonds. The New Mexico Manufactured Housing Act, NMSA 1978, Section 60-14-6 authorizes the Division¹ to write regulations that require a licensee to secure a bond to ensure a source of financial indemnity for a harmed consumer. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we conclude that the Division has broad authority to implement necessary regulations to indemnify consumer losses and that the Division's current implementation of the particular regulations you identify are consistent with that authority.

There are two general rules applicable to your question. First, an administrative agency's authority to enact regulations is found in and limited by statute. See Howell v. Heim, 118 N.M. 500, 882 P.2d 541 (1994); State Corp. Comm'n v. Mountain States Tel. & Tel. Co., 58 N.M. 260, 270 P.2d 685 (1954). Second, an administrative agency can not enlarge its statutory authority under the guise of regulations. See Public Serv. Co. of N.M. v. New Mexico Envtl. Improvement Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976); Chalamidas v. Environmental Improvement Div., 102 N.M. 63, 691 P.2d 64 (Ct. App. 1984). In summary, regulations must be fully authorized by and consistent with the directions of the governing statute. See id.

Our analysis begins with the Legislature's direction to the Division. The Division "shall adopt the necessary rules and regulations" to ensure the bond will serve "as indemnity for any loss sustained by any person damaged...." NMSA 1978, Sections 60-14-6(A), (C) (1983) (emphasis added). The terms "necessary" and "any loss" are broad terms and thus it appears that the Legislature intended to give to the Division considerable discretion to craft regulations.

The current regulations state that the bond shall not be released until all complaints have been resolved or until two years after the licensee closes business, whichever is later. See 14.12.2.18.A NMAC. In your June 14, 2004, letter you write that the Division "interprets this provision to mean that a consumer protection bond may not be released to the licensee who posts the bond until a period of two years have lapsed after the licensee ceases to do business in the State of New Mexico. However, claims against a bond may be paid as the claims are filed and after they are determined to be valid." This

position appears to be consistent with the governing statute and the Division's authority. It is a necessary regulation needed to ensure that a consumer can file a claim, and if validated, receive timely compensation to remedy the loss.

Your June 14, 2004, letter notes that a consumer has requested that the Division interpret the regulation to require the Division to hold all disbursement of funds until the expiration of the two-year period. The consumer's argument is that current pay-as-claims-are-validated model ensures timely compensation but may result in the exhaustion of the bond money prior to all possible claims being filed. As dicta, we believe this second interpretation would also be consistent with the governing statute and the Division's authority. It would be another way to protect "any loss" by a consumer. The Division, as policy-maker, has the discretion to decide which model is a better policy decision.²

The current regulations state that if the bond claims exceed the total amount of the bond, then the Division may³ distribute the proceeds on a pro rata basis. See 14.12.2.18.B NMAC. You write that the Division "interprets this provision of the regulation to mean that the Division has the discretion to distribute the proceeds of a consumer protection bond, pursuant to a claim, as claims are filed, or it may distribute the proceeds pro rata, if several claims are filed simultaneously." This position also appears to be consistent with the governing statute and the Division's authority. It is a necessary regulation needed to ensure that multiple consumers can file claims, and if validated, receive a fair portion of compensation to remedy the loss.⁴

The current regulations state that a consumer may be indemnified for its loss due to a licensee's bad acts. See 14.12.2.18.C NMAC. They are silent whether this indemnification includes attorney fees, punitive damages, or pain and suffering. You write that the Division: "does not interpret the payment of such damages to include attorney fees, punitive damages or damages claimed for pain and suffering. Since the Manufactured Housing Act allows a consumer to seek retribution in the court system or through the administrative process⁵, claims for attorney fees, punitive damages or damages claimed for pain and suffering are the types of damages that may be sought and awarded in the courts. A claim for damages under a consumer protection bond should be limited to actual damages incurred by the consumer." This position appears to be consistent with the governing statute and the Division's authority. It is a necessary regulation needed to ensure that a consumer can file a claim, and if validated, receive actual compensation to remedy the actual loss. The compensation goes to the actual person who suffered the loss (and not to an attorney) and helps remedy the actual damage related to the real property.

In addition, we believe an interpretation of the regulation that would permit a consumer who hires an attorney for the bond process to receive attorney fees (from the bond and in addition to the stated loss) would also be consistent with the governing statute and the Division's authority. It would be a manner of protecting "any loss." This policy choice is consistent with case law on automobile bond issues. "[U]nder the Surety's bond guaranteeing the payment of any loss or damages resulting from failure of title, he is

entitled to be reimbursed such reasonable expenses as have directly resulted because of the vendor's default. Thus he is entitled to recover reasonable attorney fees for representation in this court." Yoakum v. Western Casualty and Surety Co., 75 N.M. 529, 532-33, 407 P.2d 367 (1965) (emphasis added). The same rationale could similarly be applied to pain and suffering damages. It is a type of "loss." However, this policy choice may raise the question of whether an administrative body is capable of conducting such a sophisticated calculation. The rationale expressed in Yoakum does not appear to extend toward punitive damages. Punitive damages are intended to punish the person against whom they are imposed rather than to reimburse losses. See Couch v. Astec Industries, Inc., 132 N.M. 631, 644, 53 P.3d 398 (Ct. App. 2002). Thus, the award of punitive damages appears to be beyond the scope of the term "loss" and thus is inconsistent with the governing statute and the Division's authority.

We hope this response is helpful. You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. In we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

Zachary Shandler
Assistant Attorney General

Cc: Stuart Bluestone, Chief Deputy Attorney General Susan Warren, Esq. (Feferman & Warren)

[1] For clarity's sake, this letter will use the term "Division" to mean both the Division and the Manufactured Housing Committee, which have a joint role in enacting regulations.

[2] The Consumer Legal Bar has advocated raising the set bond amounts to ensure that sufficient funds are available for all consumers. See Letter from Richard Feferman, Esq. to Attorney General Patricia Madrid. (Aug. 18, 2004).

[3] Please note, the subsection uses the permissive term "may" and thus gives the Division flexibility in its application. See NMSA 1978, Section 12-2A-4(B) (1997) (Uniform Statutory and Rule Construction Act).

[4] See supra footnote 2.

[5] Rex Inc. v. Manufactured Housing Comm., 119 N.M. 500, 892 P.2d 947 (1995) and Rex Inc. v. Manufactured Housing Comm., 134 N.M. 533, 80 P.3d 470 (Ct. App. 2003) explain when a claim must proceed only in one venue and when it may be pursued in both venues.