

# COMMISSION COMMENT

Winter

2000

## Governor Appoints Harold H. Johnson To Commission

Governor Mike Johanns appointed Harold H. Johnson to a six-year term on the Real Estate Commission beginning September 2000. Harold is currently a Broker/Manager with NP Dodge Company where he has been since 1987. Prior to that, from 1969 to 1987, Harold was the Broker/Owner of Elkhorn Realty Company.

Harold has worked with government entities in the past, serving on several task forces and advisory committees including the Affordable Housing Advisory Committee task force and Fannie Mae's "House Nebraska" Advisory Council.

Harold has used his thirty-one years of experience in real estate to serve the real estate industry, as well. Harold is a Past-President of both the Omaha Area Board of REALTORS and the Nebraska Association of REALTORS. He was chosen the State Association's REALTOR of the Year in 1995. Harold has served as Chairman of many of the REALTOR Association's committees and a member of most of them. He currently serves as a Director to the National Association of REALTORS.

Harold has served his community through a variety of activities which include being: a member of the Bethany Lutheran Church Council, an Aksarben Ambassador, a Past-President of the Elkhorn Commercial Club, a Charter member of the Elkhorn Lions Club, and a Director of the Omaha Agri Business Club. Harold was elected to the Elkhorn School Board where he served as secretary for 15 years.

Harold makes his home in Elkhorn with his wife, Diane. Diane is also a real estate broker with N. P. Dodge. Harold and Diane have two daughters and two sons. Their children are each pursuing their own careers, one of whom is enjoying a career in commercial real estate.

The Commission and staff look forward to working with Harold.



*Chairperson Moore awards Commission pin to Harold Johnson*



*Commissioner Johnson*

### Commission Meeting Schedule

December 13, 2000	Lincoln
January 23-24	Lincoln
February 20-22	Omaha
March 27-28	TBA
April 24-25	TBA
May 22-23	TBA

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*Members of the Commission from left to right: Fred Fletcher, Harold Johnson, Secretary of State Scott Moore, Joan Nigro, Paul Landow, Robert Moline, not pictured: Janice Wiebusch*

**COMMISSION COMMENT**

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## 2000 Real Estate Letter

If you have not heard the news I have announced that I will be stepping down as Secretary of State this December and taking a job as Director-Government Affairs for the Union Pacific Railroad Company based in Omaha. This means, of course, that I will also be relinquishing my duties as Chairperson of the Nebraska Real Estate Commission and this will be my last time to comment in the Commission Comment.

It is hard to believe that I have been Chair of the Real Estate Commission for the past six years. I know that I have enjoyed my time on this Commission and certainly have learned a great deal about your industry. More importantly I hope that we made some progress during my tenure on the Commission.

As I look back on other annual letters I have written in past years the theme over all of them was a theme that I brought to all my duties under the umbrella of the Secretary of State's office. This is the theme of using modern technology to connect all Nebraskans with their government and using such technology to eliminate time and distance from the transaction.

With the vision of my fellow Commissioners and the hard work of the staff we have accomplished many things. Computerized testing has increased opportunity to set for the Real Estate Examination to Nebraskans in all corners of the State and our "distance education" standards will allow for even more opportunity to all Nebraskans. By the time you read this it is expected that the Commission website will allow people to search the entire database and will give licensee and consumer access to a variety of information that used to be available only at the Commission office.

In my final Commission meeting one of our last successful motions was one that will allow for the annual re-licensing process to be performed on-line. This is something that I have advocated for years and thanks to the dedication of many people this will now become a reality.

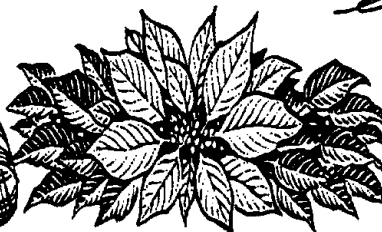
I want to say thank you to the entire Commission staff who I think have no superior in State Government. I also want to commend all of the Commissioners that I have served with on the Commission over the years. The dedication that all of these folks bring to this volunteer job is truly amazing and is really a tribute to the type of people we have here in Nebraska.

I have had a great opportunity to serve Nebraskans as an elected official for the past 14 years. It has been my pleasure to work for you and I hope that I have performed my duties with the dignity all Nebraskans deserve.

I would like to leave you with a thought that I have repeated time and time again as I have traveled across Nebraska. "Government is run by people who show up!" I know that I can count on the professional licensees here in Nebraska to keep "showing up" and making the Nebraska Real Estate Commission all it can be for all Nebraskans.

Wishing you the best of the Holiday Season and a very Happy New Year,

*Scott Moore*



## MEET THE REAL ESTATE COMMISSION STAFF

The Real Estate Commission Staff is here to serve the public and the licensee population. It is our goal to be helpful and forthright in a courteous and professional manner. We hope that when you contact our office, you always receive useful, accurate information and/or are referred to the proper authority.

Following is a communication resource to assist you when contacting our office. If the indicated person is unavailable to take your call, please share the purpose for the call and your call will be routed to someone else who can help you.

We take pride in having a skilled staff. If you have comments or suggestions as to how we may better serve you, please contact our office.

### COMMUNICATIONS GUIDE

Ask for person indicated if you have questions in the following areas.

Commission Meeting Information	Heidi Burkland InfoTech@nrec.state.ne.us
Complaint Procedures	Terry Mayrose DDEnf@nrec.state.ne.us
Continuing Education History or Inquiries	Julie Schuur EdEnf@nrec.state.ne.us
Curriculum Design (Education & Instructor Approval)	Teresa Hoffman DeputyD@nrec.state.ne.us
Errors and Omissions Insurance Inquiries	Teresa Hoffman DeputyD@nrec.state.ne.us
License Applications Packet Requests	Vera David-Beach
License Applications Process	Nancy Glaesemann Applic@nrec.state.ne.us
Licensing and Education Requirements	Teresa Hoffman DeputyD@nrec.state.ne.us
New Licenses in Process	Nancy Glaesemann Applic@nrec.state.ne.us
Specialized Registrations	Monica Wade Finance@nrec.state.ne.us
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Trust Account Matters	Terry Mayrose DDEnf@nrec.state.ne.us John Clark Bob Arterburn Ron Pierson
Webmaster	Monica Wade Finance@nrec.state.ne.us

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## FROM THE DIRECTOR'S DESK

### Secretary of State Scott Moore Embarks on a New Career

As I am sure you are aware, Scott Moore is leaving his position as Secretary of State to enter private industry with Union Pacific Railroad Company. At the time of this printing, the appointment for a replacement to this position has not been named.

The Commissioners, staff, and I would like to express our gratitude to Scott for serving so diligently and conscientiously in his role as Secretary of State and Chairperson for the Commission. His tenure has been insightful, progressive, and resourceful. We have all benefitted from his service. We extend to him our best wishes and wish him well in his new pursuits. Thank you, Chairperson Moore!

### Anonymous Advertising Question

After the Fall 2000 Commission Comment had gone to the printer, we received an anonymous inquiry which included a copy of a newspaper advertisement for a real estate licensee. The question was, "Has there been a new ruling on not having to put the brokerage firm's address on your advertising?" The answer is; No, there has not been a new ruling. Title 299, Chapter 2, Section 003 only requires: "All advertising shall be under the direct supervision of the broker and in the name the broker is conducting business as recorded with the Commission." There is no Commission requirement for an address. However, the broker for the firm may require it and that is fine.

Due to the anonymity of the inquirer, this response is approximately three and one-half months later than it could have been, had the person included his or her name.

Why wait that long for an answer? Call the office or include your name in the inquiry. There is no stigma to asking a question and remember there is no such thing as a stupid question.

### Possible Legislation for 2001

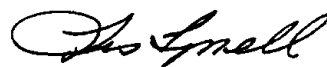
As of the writing of this Director's Desk, the Commission is considering introduction of amendments to the Legislature affecting the License Act, the Seller Property Condition Disclosure statute, the Agency Relationships statute and the Nebraska Time-Share Act.

By the time you read this the legislation should be finalized for introduction. If you would like copies of the proposed legislation you can contact our office for copies or visit our website at [www.nol.org/home/NREC](http://www.nol.org/home/NREC) and click on "Proposed 2001 Legislation".

### Website Reminder

If you have not visited our website, we encourage you to do so. Although we remain committed to assisting you personally, we think that you will find the site a useful resource and it is available to you 24 hours a day, 7 days a week. Please remember when logging-on that the address is case sensitive as follows [www.nol.org/home/NREC](http://www.nol.org/home/NREC).

In closing, I would like to wish you all a very happy Holiday Season.



Les Tyrrell,  
Director Nebraska Real Estate Commission



### We've Got Mail!!

E-mail, that is. The Commission is focusing on technology. Our goal is to enhance our accessibility and service to the Public and to our Licensee Population. With that in mind, let us call your attention to the addition of e-mail addresses in the "Communications Guide" located on page 3. If you have any questions, please feel free to contact us by phone, mail, or e-mail, so that we may be of assistance.



# Disciplinary Actions Taken by The Real Estate Commission

(Does Not Include Cases on Appeal)

1999-003 Gareld Jules Jouvenat vs. William J. White, broker. License suspended for five and one-half (5 1/2) years commencing on February 15, 2000, with the last two (2) years of said five and one-half year period to be stayed and served on probation. (Violated Neb.Rev.Stat. § 81-885.24(22) and (29) by providing substantial misrepresentations and demonstrating negligence, incompetence or unworthiness to act as a broker, associate broker, or salesperson.)  
August 23, 2000

2000-016 Doug & Sharon Klug vs. Lyle Richard Todd, broker. Stipulation and Consent Order. License censured. (Violated Neb.Rev.Stat. § 81-885.24(29) by demonstrating negligence in acting as a broker by failing to include the third-party administrator buy-out terms and the provision identifying various potential buyers in the Exclusive Listing Agreement which, in either instance, would have excluded a real estate commission to the Respondent.) August 24, 2000

2000-019 Kathleen A. Barnes vs. Scott Roger Cundall, salesperson. Stipulation and Consent Order. License censured plus three (3) hours of additional continuing education in the area of disclosures to be completed by February 23, 2001. (Violated Title 299, Ch. 5-003.20 of the Commission Rules and Regulations in effect as of January 28, 1997, by failing to disclose, in writing, to a Buyer, at or prior to the time the Buyer signs an Offer to Purchase, an adverse material fact regarding the condition of a parcel of real estate of which a salesperson has knowledge.)  
August 24, 2000

2000-034 Commission vs. Michael Gene Sonnenfelt, broker. Stipulation and Consent Order. License censured. (Violated

Neb.Rev.Stat. § 81-885.24(26) by violating a rule or regulation adopted and promulgated by the Commission in the interest of the public and consistent with the Nebraska Real Estate License Act, specifically, the Respondent violated Title 299, NAC, Ch. 5-003.04 by failing to make known, in writing, to a purchaser any interest the Respondent had in the property he was selling prior to the buyer becoming obligated to purchase the property.) August 24, 2000

2000-014 Harold E. Nott & Adrian C. Lofgren vs. Kaylene B. Swanson, broker. Stipulation and Consent Order. License suspended for thirty (30) days from October 9, 2000 through November 7, 2000; plus an additional six (6) hours of continuing education, including three (3) hours in the area of agency and three (3) hours in the area of license laws to be completed by April 1, 2001. (Violated Neb.Rev.Stat. § 81-885.24(14) by negotiating a sale directly with an owner after knowing such owner has a written outstanding listing contract in connection with the property granting an exclusive agency or exclusive right to sell to another broker; § 81-885.24(26) by violating a rule or regulation adopted and promulgated by the Commission in the interest of the public and consistent with the Nebraska Real Estate License Act, specifically, the Respondent violated Title 299, NAC, Ch. 5-003.10 by failing to identify to the seller, in writing, at the time the offer was presented and accepted, those categories of cost the seller would be expected to pay at closing, by failing to prepare a written estimate of the costs the seller would be expected to pay at closing, and by failing to obtain the written signature of the seller and maintain a copy of

the document in the transaction file; § 81-885.24(29) by demonstrating negligence or incompetency to act as broker for actions including incorrectly completing the Acknowledgment of Disclosure forms, not knowing when the listing expired, contacting the sellers when they had an exclusive listing with another agency rather than contacting the agency, and proceeding with closing without notifying the listing agent.)  
October 2, 2000

2000-025 Commission vs. Roger Theodore Waldo, broker. Stipulation and Consent Order. License suspended for thirty (30) days from October 2, 2000 through October 31, 2000, with entire period stayed and served on probation; plus an additional six (6) hours of continuing education, including three (3) hours in the area of agency and three (3) hours in the area of contracts, to be completed by April 1, 2001. (Violated Neb.Rev.Stat. § 76-2417(1)(c)(ii) by failing to present written offers to the Seller, through the Court appointed Temporary Conservator in a timely manner regardless of whether the property is subject to a contract for sale or lease of a letter of intent to lease; § 76-2422(2) by failing to enter into a written agency agreement with the sellers, which includes the Respondent's duties and responsibilities specified in § 76-2417, the terms of the compensation, and whether an offer of subagency shall be made to any other designated broker before engaging in any of the activities enumerated in § 81-885.01(2).)

October 2, 2000

# Brokerage Relationships Pamphlet Compliance Under Scrutiny

Through the Trust Account Examination Program, each employing broker is informed which affiliated licensees have failed to correctly complete the "Acknowledgment" page of the Brokerage Relationships in Real Estate Transactions pamphlet. The employing broker can then discuss non-compliance issues with the individual licensees.

Examples of non-compliance include: not completing the "Acknowledgment" page in part or at all; not checking the applicable boxes; checking the boxes incorrectly; and not having clients or customers print their names on the line following the signature line. These items, and other deficiencies, are reported to employing brokers so that they can educate the identified licensees regarding proper procedures. The Commission can (and will) file complaints against individual, non-compliant affiliated licensees who show no initiative to improve their compliance with agency law, as it relates to disclosure and completion of the "Acknowledgment" page of the pamphlet.

During a three-month period in 2000, 86% of pamphlets reviewed during Trust Account Examinations were in total compliance with the Agency Relationships statute. In an effort to improve that percentage, the following article is a compilation of information presented in Commission Comment articles since 1995 which have addressed the proper use of the Brokerage Relationships pamphlet, and specifically the "Acknowledgment" page.

## Who Gets One?

Licensees are required to provide a completed Brokerage Relationships pamphlet to any buyer, tenant, seller, or landlord in a trans-

action who is not represented by a real estate licensee. The licensee must also disclose what types of brokerage relationships are being offered by the designated broker and affiliated licensees, or disclose which party the licensee is representing. Disclosures must be made, in writing, during or following the first substantial contact with the unrepresented party. [Neb. Rev. Stat. § 76-2401 through 76-2430]

## First Substantial Contact

According to the Agency Relationships statute, disclosure of how a licensee is working with a seller, landlord, buyer, or tenant must take place "at the earliest practicable opportunity during or following the first substantial contact with a seller, landlord, buyer, or tenant who has not entered into a written agreement for brokerage services with a designated broker..."

The definition of "the first practicable opportunity" depends upon the circumstances of each situation. A time limitation may be a circumstance that prevents the disclosure from being practicable. For example, it may not be practicable to make the disclosure during a brief residential showing arranged during the potential buyer's lunch break, during a potential tenant's brief tour of an apartment, or during a telephone conversation which turns out to be a substantial contact. When hosting an Open House, not every visitor needs to be given the required written disclosure, even if fliers which include the price and specifications or licensee promotional brochures are provided. If a substantial discussion of the property ensues with a potential buyer, the disclosure should then be made by completing the "Acknowledgment" page, either during the Open House or at the "earli-

est practicable opportunity...following the first substantial contact."

In the case of an Open House, a lunch break showing, or a brief apartment tour, the "practicable" time to make the disclosure may actually be when the licensee next meets with the interested party. At an auction, the first substantial contact occurs when the successful bidder is identified. In the case of a telephone conversation, e-mail, or any other substantial contact not made in person, the completed Brokerage Relationships pamphlet should be included when additional materials are sent to the interested party. In the cover letter, request that the "Acknowledgment" page be signed and returned, and keep a copy of the letter. If the interested party does not return the signed page, you will have your copy of the letter which documented that you provided the pamphlet, and that you requested its return. By law, if a party refuses or fails to sign the "Acknowledgment" page, the licensee can note said refusal or failure to sign on the page, and be in compliance with the disclosure requirement [Neb. Rev. Stat. § 76-2421(5)].

## Licensees as Principals

Real estate licensees who are also principals in real estate transactions, sales, or leases do not need to complete and maintain "Acknowledgment" pages for themselves, but they are required to disclose to the other party or parties that they are real estate licensees.

Spouses of real estate licensees do not need to sign "Acknowledgment" pages for properties owned jointly or in which only the licensee and the spouse have an interest, or if the licensee acts as a buyer or tenant

*(Continued on page 6)*

agent for themselves and their spouse. Appropriate disclosures must be made to the other party or parties in the transaction.

If a builder is also a real estate licensee, disclosure requirements depend on the role played in the transaction. If the builder/licensee is only acting as the builder in the transaction, the builder would need to provide written disclosure that s/he is also a licensee to the buyers before they become obligated to purchase [299 NAC 5-003.04], but would not need to provide the Brokerage Relationships pamphlet. If the builder was acting as both a licensee and a principal, the builder would need to disclose that fact and make any and all other disclosures required of a licensee in a real estate transaction, including agency [299 NAC 5-003.08].

**Client or Customer?**

The Agency Relationships Statute defines client as a seller, landlord, buyer, or tenant who has entered into a brokerage relationship with a licensee. A customer is defined as a seller, landlord, buyer, or tenant who has **not** entered into a brokerage relationship with a licensee, but who is a party in a real estate transaction in which a licensee is involved. A brokerage relationship is defined as the relationship created between the licensee and a client, who then relies on the licensee to perform real estate services as a limited seller agent, a limited landlord agent, a limited buyer agent, or a limited tenant agent; or between the licensee and two clients as a limited dual agent.

Basically, the party is a client if the licensee represents the party as a limited or common law agent. The party is a customer if the licensee is working with the party, but not representing the party as a limited or common law agent. (See next section for further discussion of common law

agent.) To put it in more familiar terms, the clerk at a department store represents the owner of the department store, so the owner is the clerk's client. The clerk represents the owner/client when making a sale to a customer.

The following examples may help licensees to determine whether a principal is a client or a customer:

1. If a licensee takes a listing as the limited agent of the seller, then the seller is the client.
2. If a licensee enters into a management agreement with an owner or landlord as the common law agent of the owner/landlord, then the owner/landlord is the client.
3. If a licensee, either under the statutory provision or by written agreement, acts as a buyer's/tenant's agent when assisting a prospective buyer/tenant to find a property to buy or lease, and the licensee does not have any written agreements to represent sellers/landlords of properties shown to this party, then the buyer/tenant is the client, and the sellers/landlords of the properties shown are customers.
4. If a licensee is the limited agent of a potential purchaser who wishes to purchase a "For Sale By Owner" or other property not listed by the licensee, then the owner/seller is a customer.
5. If a licensee is the limited agent of a potential tenant interested in a "For Lease By Owner" or other property managed by another licensee, then the owner/landlord is a customer.
6. If a licensee is the limited agent of a seller or owner/landlord, and a potential buyer/tenant contacts the licensee to see the property, then the potential buyer/tenant is a customer.

7. If the licensee is representing each party on an individual basis, and they come together on the same property, then both the buyer/tenant and the seller/landlord are clients in a limited dual agency situation.

**Common Law Agent**

If the licensee represents a person in a transaction, and performs only those duties and obligations set out in the Agency Relationships statutes, then the licensee is a limited agent. If the licensee represents a person in a transaction, and performs duties and obligations which **exceed** those set out in the statute, then the licensee is a common law agent. For instance, if a licensee is authorized by the owner/landlord to enter into lease agreements with tenants on the owner/landlord's behalf, the licensee would be a common law agent for the owner/landlord.

Licensees operating under a common law agency agreement are **not** required to provide Brokerage Relationships pamphlets to customers, usually tenants, in transactions. Neb. Rev. Stat. § 76-2416 removes the common law agent from the duties and responsibilities under the Act, which includes providing the pamphlet to customers/tenants or prospective tenants.

When offering services to a landlord, the Brokerage Relationships pamphlet must be completed appropriately and signed, because the licensee must make all required disclosures until the landlord enters into a common law agency agreement with the licensee.

**Checking The Boxes**

The following scenarios involve a sales transaction in which the licensee is the listing agent, and are intended to provide some guidance in how to use the Brokerage Relationships pamphlet.

1. If the licensee is performing a listing presentation to a prospec-

tive seller, and does not obtain the signed listing agreement upon completing the listing presentation, the licensee may complete **either** Section 1, which states "Licensee has informed me that licensee is offering to act as my limited Seller's Agent," **or** Section 2, and mark "offering to act," "Seller's Agent," "offering to provide," and "Client, as my agent."

If a listing agreement is completed several days after the listing presentation, and the listing agent is the same licensee who performed the disclosure during the listing presentation, a new pamphlet is not needed if the listing contract specifies that the licensee represents the seller as a limited seller's agent.

2. When the licensee enters into

a listing agreement during the first substantial contact with the seller, the licensee must complete Section 2, and mark "acting," "Seller's Agent," "providing," and "Client, as my agent."

3. When the licensee/listing agent shows a listed property to any unrepresented prospective buyer, the licensee must complete Section 2, and mark "acting," "Seller's Agent," "providing," and "Customer, not as my agent."

In all the scenarios listed above, the completed Brokerage Relationships pamphlet must be presented to the appropriate party for signature at or following the first substantial contact. The licensee should obtain the dated signature and the printed name of the party, and should also sign and date the form at the bottom. If the party refuses to sign, the licensee should note the refusal on the form, sign and date the form, and retain it

in the transaction file to document the licensee's compliance with agency law.

The same general principles apply to more complex situations. Depending on how the designated broker has written the company's agency policy, all affiliated licensees may be bound by each agency relationship, or individual licensees within a firm may be appointed to represent each party in a transaction.

In property management situations, under limited agency, licensees are required to complete pamphlets for the landlord and tenant in the same manner as outlined above, but substituting "Landlord's Agent" and "Tenant's Agent" as applicable. Under common law agency, the licensee would complete the pamphlet only for the landlord.

In all cases, it is recommended that the licensee review the form for completeness, before adding it to the transaction file.

## Siding Dispute Earns Homeowner Millions Broker Awareness Important

*(Editor's Note: The following article was reprinted with permission for the Agency Law Quarterly Real Estate Intelligence Report July 2000.)*

A California court has approved a plan by which Weyerhaeuser Co. could pay hundreds of millions of dollars in homeowner claims for producing defective wood siding, creating yet another problem area-like synthetic stucco and PVC pipe for real estate agents to be aware of.

Agents typically will not be obligated to aggressively discover whether the siding is used on their listings, but will be obligated to disclose it if they become aware of it or reasonably suspect it.

While the court-approved plan specifically impacts California, it will likely be embraced by courts in

Oregon, Texas, Iowa, and South Carolina, where other class action lawsuits are underway. Defective siding also was sold in Colorado, Arizona and Washington state, where legal actions are expected.

California homeowners sued Weyerhaeuser for selling a wood-siding product made of compressed wood chips, fiber, resin and wax. Court documents indicate that on thousands of homes, apartments and other buildings where the siding was installed, the product experienced failure within a few months to a few years--becoming swollen, warped, splitting and rotting.

Documents showed that nearly 2 billion board-feet of siding was made at Weyerhaeuser's Klamath Falls, Ore., plant. The product was produced and sold from 1981 to 1999.

Dan Garrett of the California Department of Real estate said sellers had a general obligation to disclose whether the siding is on their home if they know. For brokers and agents, however, the law requires only that the salesperson conduct a "reasonably competent and diligent" visual inspection and reveal problems that are found.

Texas Real Estate Commission General Counsel Mark Mosely added that the degree of responsibility goes up for a broker if, for instance, he is aware that siding on other homes in a subdivision has failed, even if the siding on his particular listing has not (yet) failed.

Local media coverage of siding failures also could impact what a broker is reasonably expected to know.

(Continued from page 7)

Buyer agents are urged to closely work with inspectors to help their clients avoid problems.

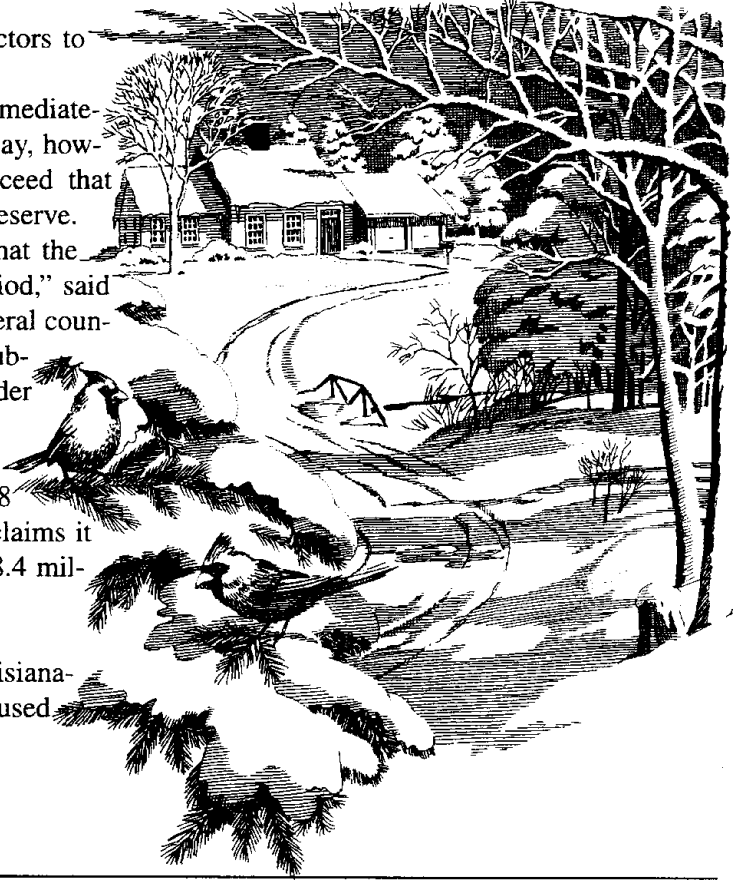
Under terms of the settlement, Weyerhaeuser will immediately set up an \$82 million fund to pay claims. Insiders say, however, the amount of claims almost certainly will exceed that amount and more money will have to be added to the reserve.

"This is a claims-based settlement, which means that the claims will be paid as submitted over a nine-year period," said Robert Dowdy, a Weyerhaeuser vice president and general counsel. "An independent adjuster will review each claim submitted and determine if it qualifies for payment under terms of the settlement agreement."

According to court records, the company also will pay 11 law firms that represented the homeowners \$18 million--about 15 percent of the first \$120 million in claims it expects to receive. The lawyers will receive another \$8.4 million on the next \$70 million in claims made.

The deadline for claims is 2009.

Following a similar settlement three years ago, Louisiana-Pacific has paid out \$475 million to consumers who used siding that also failed.



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