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Opinion No. 79-354

Mr. Eugene S. Lambert, Ex. Director
State Department of Business Regulations
330 East Fourth South Street
Salt Lake City, Utah 84111

Re: The sales of real estate instruments for profit under the Utah Uniform Securities Act.

Dear Mr. Lambert:

This opinion is in response to the request dated November 7, 1979, regarding sales of real estate instruments for profit under the state securities laws, and whether such sales are sales of securities and whether the entities selling them are security dealers.

Under Code Section 61-1-3 the definition of "security" includes any "evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, . . .or, in general, any interest or instrument commonly known as a 'security', ..."

There is limited Utah case law construing this definition, but there is a multitude of pursuasive authority. Logically, a mortgage or mortgage note would be classified as an "evidence of indebtedness" in terms of economic reality. Federal decisions on this matter have restricted the application of the federal securities acts to those notes that are investment in nature and have excluded those notes which are only reflective of individual commercial transactions. See 15 U.S.C. §77(b)(1) Also in 163 A.L.R. 1050 citing People v. Leach, 106 Cal. app. 442, 290 P. 737 (1930), the court said that mortgage notes which were secured by mortgages which were offered to the public were held to be securities. Under the Federal law, exemptions were given only to the original mortgage transaction.

An Arizona case stated that where a mortgagee was in the business of selling mortgage notes, assigning mortgages to buyers, guaranteeing payment to investors who expected to make money, the notes, morgages and assignments were "securities" within state and federal laws and not exempt from registration requirements. Hall v. Security Planning Service, Inc., 371 F. Supp. 7, 14 (D.C. Ariz. 1974)

Finally, a California case cited numerous factors which constituted sales of securities. These factors including the plan of distribution, the economic inducement held out to prospects, the results dependant on one other than the purchaser and the common enterprise supporting a finding that the defendant's sales of second trust deeds or second mortgages constitued sales of securities. Los Angeles Trust Deed and Mortgage Exchange v. S.E.C., 285 P.2d 162 (Cal. 1960)

These interpretations of essentially similar security acts conclusively require the registration of real estate instruments for profit as securities under the Utah Uniform Securities Act. This also would mandate the registration of these broker-dealers under the same act.

The application of the transactional exemption under §61-1-14 (2)(e) would only apply in cases where the sales were "isolated" and not "repeated or successive." This means that transactions undertaken and performed one after the other, and sales made within a period of such reasonable time as to indicate that one general purpose actuates the vendor, such as the subject ads would indicate, would qualify as repeated and successive transactions. Nelson v. State, 355 P.2d 413 (Okla. 1960)

Advertisements of the nature involved in this opinion would not be isolated sales but ones of repeated sales of like nature, thus excluding these dealers from the exemptions. Koeneke v. B and O Lumber Co., 356 P.2d 149 (1960)

The main purpose of the exemption is to exclude sales of mortgages of individual transactions, this does not include brokers' repeated and successive transactions.

Very truly yours,

Arthur A. Allen
Assistant Attorney General

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