

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

**Director of the Manufactured  
Housing and Modular Units Program  
of the Public Service Commission,** )

**Complainant, )**

**v. )**

**Case No. MC-2004-0079**

**Amega Sales, Inc., )**

**Respondent. )**

**RESPONDENT'S INITIAL POST-HEARING BRIEF**

**I. Statement of Facts and Summary of Evidence**

**A. General.**

The only transaction and the only manufactured home at issue in this case is the manufactured home purchased by Don and Terri Higginbotham (the "Higginbotham Home"). The Higginbotham Home is described in the Complainant's Complaint as a 2000 Skyline Model Manufactured Home bearing serial number 0151-0412-MAB. The undisputed and uncontroverted evidence that was presented to the Commission at the hearing in this case was that the purchasers of the Higginbotham Home were satisfied with all aspects of the transaction in which the Higginbotham Home was acquired and that the

Higginbothams have no complainant whatsoever with Respondent or A & G Commercial Trucking, Inc. (Tr. 229-231; Tr. 241; Deposition of Don Higginbotham, pages 15 through 17, 18-19, and 26-27<sup>1</sup>).

The Complaint before the Commission does not concern any transactions or occurrences or any other manufactured homes other than the Higginbotham Home.

B. A & G Commercial Trucking, Inc. was the owner and seller of the Higginbotham Home.

The evidence that was introduced at the hearing of this matter was that A & G Commercial Trucking, Inc. ("A & G") was at all relevant times the owner of the Higginbotham Home and was, in fact, the seller of the Higginbotham Home to the Higginbothams. There was no evidence whatsoever presented to the Commission that Respondent ever even owned the Higginbotham Home or that Respondent sold the Higginbotham Home to the Higginbothams.

One of the exhibits introduced into evidence at the hearing was the manufacturer's certificate of origin with respect to the Higginbotham Home (Exhibit 16). The manufacturer's certificate of origin clearly showed, and it was not disputed, that the manufacturer of the home (Skyline Corporation) transferred title to the Higginbotham Home to A & G in November of 1999 (Exhibit 16; Tr. 358). The Higginbotham Home was acquired by A & G because A & G was obligated to purchase it from the manufacturer after damage had been sustained to the Higginbotham Home (Tr. 358-59).

Also in evidence in this case is the certificate of title to the Higginbotham Home (Exhibit 15). The certificate of title also showed that it was in A & G's name and was not ever in Respondent's name (Exhibit

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<sup>1</sup>All references to "Tr." herein refer to the transcript of the hearing in this case.

15). In fact, there is no evidence that was produced to the Commission that Respondent ever owned the Higginbotham Home or any interest therein.

Don Higginbotham testified that he and his wife took title to the Higginbotham Home from A & G (Tr. 225-228). The seller of the Higginbotham Home to the Higginbothams was A & G (Tr. 225-28). Greg DeLine also testified that the purchase was made by the Higginbothams from A & G (Tr. 353). The only parties to the transaction (the seller and the buyer) both testified that the seller of the home was A & G; there was no contrary evidence, and in fact there can be no contrary evidence because the people who testified to this effect were the only parties to that transaction.

The Stipulation of Settlement that is in evidence in this case as Exhibit 3 also was entered into between the Higginbothams and A & G. It states clearly and unequivocally that "the actual Seller of the Home was A & G Commercial Trucking, Inc." (Exhibit 3, paragraph 4). Furthermore, the undisputed testimony was that A & G was paid the purchase price for the Higginbotham Home (Tr. 384).

The evidence clearly demonstrated that Respondent and A & G are separate and distinct corporations and separate and distinct entities (Exhibits 21 and 22). There was no evidence and there is in fact no allegation in the Complainant's Complaint that Respondent and A & G were involved in any sort of broker relationship or any sort of agency relationship with respect to the sale of the Higginbotham Home.

Complainant would have the Commission believe that Respondent was the seller of the Higginbotham Home, but there simply was no evidence of any kind introduced to the Commission to support that allegation. For example, there was no evidence introduced that the Higginbothams paid any consideration to Respondent for the Higginbotham Home. The only title transfer documents that were

introduced showed that the Higginbotham Home was conveyed from A & G and not from Respondent (Exhibits 15 and 16). In fact, the Form 500 introduced as Exhibit 1, on which Complainant relies so heavily in this case (which Respondent strongly contends describes and relates to an entirely different home than the Higginbotham Home) contains no words of conveyance whatsoever. The undisputed and clear evidence was that the Higginbotham Home was at all times titled in A & G's name and never in Respondent's name; therefore, A & G necessarily and by definition had to be the seller of the Higginbotham Home to the Higginbothams.

Furthermore, Tim Haden's testimony indicates that he was aware at least as early as March 13, 2002 that A & G was the owner of the Higginbotham Home (Tr. 276-77).

All parties to the purchase transaction involving the Higginbotham Home (those parties being A & G and the Higginbothams) agreed and testified at the hearing that A & G was the seller of the Higginbotham Home. All of the documentary evidence in this case also supports that fact. There can be no doubt or dispute about this point.

C. The Form 500 in evidence as Exhibit 1 does not relate to the Higginbotham Home.

Exhibit 1 that was introduced into evidence in this case is a purchase contract relating to a model year 2001 Skyline manufactured home (Exhibit 1). Complainant would have the Commission believe that Exhibit 1 describes the Higginbotham Home and was a document by which legal title to the Higginbotham Home was transferred to the Higginbothams by Respondent. However, the evidence that was presented to the Commission simply does not support that conclusion.

Exhibit 1 by its express, unambiguous and undisputed terms does not describe the Higginbotham Home. First, there is no serial number on Exhibit 1 (Exhibit 1). Complaint contends that Exhibit 1 was

entered into on May 2, 2002. If that was the case, and if Exhibit 1 relates to the Higginbotham Home as Complainant suggests, then the serial number of the Higginbotham Home clearly was known by Respondent and could easily have been noted on Exhibit 1. The fact that it was not noted on Exhibit 1 (despite there being a specific location on Exhibit 1 for the placement of the serial number) is evidence that strongly suggests that Exhibit 1 related to a manufactured home other than the Higginbotham Home.

Furthermore, Exhibit 1 on its face describes a model year 2001 home. The clear, unambiguous, unequivocal and undisputed evidence that was presented to the Commission in this case was that the Higginbotham Home was not a 2001 home. The evidence was that the Higginbotham Home was a model year 2000 home (Tr. 366), although there was some evidence that it may have been a 1999 model year home. There is absolutely no evidence, however, that the Higginbotham Home was a model year 2001 home. Again, the model year of the Higginbotham Home was clearly ascertainable by Respondent as of May 2, 2002, so the fact that Exhibit 1 refers to a 2001 model year home is convincing evidence that Exhibit 1 in fact refers to and describes a home other than the Higginbotham Home.

Another consideration is that the purchaser shown on Exhibit 1 is only Don Higginbotham, and no mention is made of his wife (Exhibit 1). The evidence presented at the hearing was that Mr. Higginbotham's wife, Terri, also was a purchaser of the Higginbotham Home (Exhibit 15).

Neither the amount of the purchase price nor the amount of the sales taxes shown on Exhibit 1 lead to the conclusion that Exhibit 1 describes the Higginbotham Home. The Higginbotham Home was purchased for just over \$38,000.00 (Exhibit 15). Exhibit 1, however, states that the gross purchase price of the home described therein was \$70,900.00, or almost twice as much as the Higginbothams actually paid

for the Higginbotham Home. As a result, the sales tax amount on Exhibit 1 could not possibly be consistent with what the Higginbothams paid.

Further, Exhibit 1 has Respondent's name at the top rather than A & G's name. As was demonstrated above in this brief, the facts introduced in evidence in this case clearly show that A & G was at all times the owner of the Higginbotham Home and was the seller of the Higginbotham Home.

Perhaps most important, testimony was adduced at the hearing from all parties to the sales transaction involving the Higginbotham Home that Exhibit 1 does not represent and does not constitute the purchase contract that was entered into with respect to the Higginbotham Home. Greg DeLine testified to this effect (Tr. 363). Mr. Higginbotham testified that Exhibit 1 does not describe the home that he and his wife ultimately purchased from A & G (Tr. 229).

At most, Exhibit 1 only shows that Respondent entered into a contract to sell some new 2001 Skyline manufactured home for \$70,900.00 to Don Higginbotham. Exhibit 1 does not show and there is no evidence that Exhibit 1 is the contract for the Higginbotham Home. In fact, for the reasons pointed out above, Exhibit 1 demonstrates more than anything that it is for an entirely separate manufactured home than the Higginbotham Home.

D. There was undisputed evidence that the Higginbothams shopped for several different manufactured homes, which is further evidence that Exhibit 1 did not describe the Higginbotham Home.

There was substantial testimony adduced at the hearing that the Higginbothams were interested in and actually looked at several different homes. Mr. Higginbotham himself testified to that effect (Tr. 216-17; Tr. 220). The Complainant himself, Ron Pleus, testified that it is possible that Exhibit 1 might relate to a separate home than the one that the Higginbothams actually purchased (Tr. 176). Mr. Pleus also testified

that it was possible that more than one purchase contract was entered into by the Higginbothams (Tr. 176-77). The evidence was that the Higginbothams first began shopping for a manufactured home with Respondent in March of 2002 (Tr. 350). The Higginbothams experienced credit problems, however (Tr. 350). The evidence was that the Higginbothams expressed their desire to purchase a new manufactured home, and that they looked at several homes and probably every home that Respondent had in stock (Tr. 350-51).

Greg DeLine testified that it was quite possible that the Higginbothams entered into more than one Form 500 purchase contract (Tr. 351, 362). He also testified that it was common for customers in general to enter into a Form 500 purchase contract only to see the transaction described in that contract not ultimately close or come to fruition (Tr. 364).

There was further testimony that the dollar amounts shown on the face of Exhibit 1, and specifically for the purchase price and sales taxes, were not the same as the amounts described in the Stipulation of Settlement (Exhibit 3). The importance of that fact is that it demonstrates that the two documents referred to and described two different manufactured homes, which means further that Exhibit 1 does not describe the Higginbotham Home that was ultimately purchased.

The point of this analysis is that if the Higginbothams were interested in purchasing a new home, and if the Higginbothams shopped for and looked at virtually every home that Respondent had on its sales lot, it suggests that it is quite likely that the home described in Exhibit 1 is a home other than the home that the Higginbothams ultimately purchased from A & G. Again, the evidence that was presented at the hearing, and particularly the evidence that was introduced by the participants in the transaction themselves (Mr. Higginbotham and Greg DeLine) suggests that Exhibit 1 was for a new home that the Higginbothams

wanted to purchase but for which they could not qualify for financing. After the Higginbothams' financing problems came to light, Mr. DeLine became personally involved in the transaction (Tr. 350). It is a reasonable inference from the evidence that the transaction described in Exhibit 1 never closed because the Higginbothams could not qualify for financing; Exhibit 1 was effectively abandoned, and the parties moved on and Mr. and Mrs. Higginbotham ultimately purchased the Higginbotham Home as part of a separate and distinct transaction.

E. The Higginbotham Home was not sold subject to a prohibitive sale notice.

It is important to note that a fair reading of the Complainant's Complaint in this case does not allege that the Respondent sold the Higginbotham Home while it was subject to the Director's prohibitive sale notice ("Red Tag"). The Director himself testified at the hearing that he is not alleging that the Higginbotham Home was sold while it was subject to a Red Tag (Tr. 167). Mr. Pleus admitted at the hearing that the Red Tag, if it was ever applied to the home in question, was removed prior to its sale (Tr. 167). These admissions by the Director should completely and fully dispose of any suggestion that the Higginbotham Home was sold while it was subject to a Red Tag.

The evidence that was introduced at the hearing established that the Higginbotham Home was delivered in July of 2002 (Tr. 296). The Complainant's Complaint also alleges that (Complainant's Complaint, paragraph 14). If Complainant takes the position that the Higginbotham Home was sold in May of 2002, that is contrary to the Complaint and the express admissions of Ron Pleus (Tr. 167). It also is not supported by the evidence. If the Complainant relies on Exhibit 1 to support such an allegation, such reliance is misplaced because Exhibit 1 is nothing more than a purchase contract which was to be



performed and closed at a later date (Exhibit 1). Exhibit 1 contains no words of grant or conveyance and in fact is conditioned on payment of the purchase price, among other things (Exhibit 1).

In summary, if it is the Complainant's position that the Higginbotham Home was sold subject to a Red Tag, that position clearly was not proved at the hearing.

F. There was no evidence that the Higginbotham Home lacked HUD labels or Public Service Commission labels when it was sold.

The evidence in this case is that the Higginbotham Home was delivered to the Higginbothams by A & G in July of 2002 (Complainant's Complaint, paragraph 14; Tr. 296). The evidence also was that the purchase transaction for the Higginbotham Home was finalized and closed in March of 2003 (Exhibit 15; Tr. 383).

The Complainant asks the Commission to find that the Respondent "sold a manufactured home to Don Higginbotham" in violation of Section 700.045 RSMo. In order to do that, the Commission must find that the Higginbotham Home did not "bear a seal as required by Sections 700.010 to 700.115." The evidence that was introduced before the Commission simply does not support any such allegation or conclusion.

Tim Haden, who was the Director's agent and who inspected the Higginbotham Home, himself admitted that he does not know whether the Higginbotham Home had HUD labels on it on July 10, 2002, because he did not inspect the Higginbotham Home or see the Higginbotham Home on that date. (Tr. 296-97). Mr. Haden also testified that he does not know when the HUD labels on the Higginbotham Home were removed (Tr. 294). Therefore, there was no evidence introduced that the Higginbotham Home did

not have HUD labels on it in July of 2002 (when it was delivered) or in March of 2003 (when the transaction was closed and consummated).

In addition, and perhaps more important, there is absolutely no evidence in the record whatsoever as to whether the Higginbotham Home had affixed to it a seal issued by the Commission as contemplated by Section 700.010(13) RSMo. The only testimony and evidence given at the hearing concerned the presence or absence of HUD labels. There was no evidence given and no questions asked about the presence or absence of Public Service Commission labels as is authorized and contemplated in Section 700.010(13) RSMo. See also section V. C. below of this brief.

G. The Higginbotham Home was a used home.

Complainant is and was obligated to prove in this case that the Higginbotham Home was a new home, but for the reasons stated in this brief, the Complainant failed in this regard and did not carry his burden.

The only relevant definition of a "new manufactured home" is contained in Section 700.010(8) RSMo. That definition reads as follows:

"New", being sold or offered for sale to the first purchaser for purposes other than resale;"

Based on the evidence that was presented to the Commission, the Higginbotham Home can only be categorized as and called a used home.

First, Mr. Higginbotham stated in the stipulation of settlement and in his testimony that the Higginbotham Home was a used home (Exhibit 3, paragraph 2; Tr. 222-23).

Equally important is the fact that when A & G acquired the Higginbotham Home it did so not strictly for resale but for several other possibilities. Mr. DeLine testified that when A & G acquired title to the Higginbotham Home, he had contemplated making an office out of it or possibly selling it for salvage (Tr. 361).

The evidence further clearly was that the Higginbothams did not pay sales tax on the Higginbotham Home. That testimony came both from Mr. Higginbotham (Tr. 207) and Greg DeLine (Tr. 444).

The statutory definition of a "new" manufactured home in Section 700.010 only concerns whether the home has been sold to the "first purchaser for purposes other than resale." The manufacturer's certificate of origin (Exhibit 16), the certificate of title (Exhibit 15) and the testimony from Greg DeLine (Tr. 361) all lead to the conclusion that the Higginbotham Home was a used home and not a new home. The home was sold from the manufacturer to A & G for purposes other than resale. Mr. DeLine testified that A & G was required to purchase the Higginbotham Home from the manufacturer because of the damage that had been done to it (Tr. 358-59), and that A & G purchased it for use possibly as an office and possibly for salvage but not necessarily for resale (Tr. 361).

Based on this evidence, the Commission should conclude that the Higginbotham Home was a used home. Respondent submits that if the Commission concludes that the Higginbotham Home was a used home, the decision in this case must be in favor of Respondent.

#### H. Admissions by the Missouri Attorney General.

One of the requests by the Complainant in this case of the Commission is to find that the Respondent violated Section 407.020 RSMo. in connection with the sale of a manufactured home to Don Higginbotham (Complainant's Complaint, last paragraph).

By previous order of the Commission, the Missouri Attorney General was made a party to this case. The Commission subsequently granted the Missouri Attorney General's motion to be dismissed from the case, but that order was not effective until June 1, 2004.

Prior to the date when the Missouri Attorney General was dismissed as a party in this case, it filed a declaration in a lawsuit pending in the Circuit Court of Boone County, Missouri, Case No. 04CV165070 (the "Boone County Lawsuit"). In the Boone County Lawsuit, one of the issues is whether Respondent Amega Sales, Inc. has violated Section 407.020 RSMo. which also is at issue in this case now before the Commission.

A copy of the declaration was introduced into evidence at the hearing of this matter as Exhibit 17. That declaration clearly and unequivocally establishes that the Missouri Attorney General had concluded that no violation of Section 407.020 RSMo. had occurred in connection with the Higginbotham transaction (Exhibit 17, paragraph 9). Because the declaration was filed at a time when the Missouri Attorney General was still a party to this case, it constitutes an admission by a party. The Respondent believes that the Commission should attach great weight to that statement because it is a statement made by the chief law enforcement officer of the state of Missouri, who also is one of the parties with authority to enforce and sue under Section 407.020 RSMo., that no violation of that statute had occurred in this case.

I. All parties to the Higginbotham transaction agree that no misrepresentations were made in connection with that transaction.

Both of the parties to the sales transaction involving the Higginbotham Home testified at the hearing of this case that there were no misrepresentations made in connection with that transaction. Mr. Higginbotham testified to that effect, both in his deposition testimony which was introduced and at the

hearing (Tr. 229-31, 241; Deposition of Don Higginbotham, pages 15-17, 18-19). Greg DeLine also testified to this effect, and stated that neither of his companies sold a used home to the Higginbothams while representing to them that it was a new home (Tr. 353).

This testimony is particularly important because Mr. DeLine and the Higginbothams are the only parties who could possibly know whether any misrepresentations were made to the Higginbothams. Both parties confirmed that no such misrepresentations were made. Mr. Higginbotham made it abundantly clear in his testimony that he and his wife are completely satisfied with the transaction and have had no complaints whatsoever relating to it and have no reason to have this action brought against Respondent (Tr. 229-230; deposition of Don Higginbotham, pages 15-17, 18-19).

## **II. Summary of Complainant's Complaint**

In essence, the Complainant's Complaint in this case alleges violations of Sections 700.045 and 407.020 RSMo. The Complainant requests that the Commission rely on Section 700.100 RSMo. to find violations of Sections 700.045 and 407.020 RSMo. and to suspend the dealer registration of the Respondent and impose other sanctions.

Paragraphs 8 and 9 of the Complainant's Complaint cite Sections 700.045 RSMo. Specifically, Complainant appears to rely on Section 700.045(2) RSMo. which provides that it is a misdemeanor:

"To rent, lease, sell or offer to sell any new manufactured home or new modular unit or used modular unit used for educational purposes manufactured after January 1, 1974, which does not bear a seal as required by sections 700.010 to 700.115."

In other words, the Complainant's Complaint alleges that the Respondent committed a misdemeanor by violating Section 700.045(2) RSMo. by selling the Higginbotham Home as a new manufactured home.

Paragraphs 6 and 7 of the Complaint rely upon and cite Section 407.020 RSMo., which provides in pertinent part:

"1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice of the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice."

3. Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class D felony. "

"4. It shall be the duty of each prosecuting attorney and circuit attorney in their respective jurisdictions to commence any criminal actions under this section, and the attorney general shall have concurrent original jurisdiction to commence such criminal actions throughout the state where such violations have occurred."

In the prayer for relief (in the last paragraph of the Complaint) the Complainant requests that the Commission "find that Amega sold a manufactured home to Don Higginbotham" in violation of Sections 700.100, 700.045, and 407.020 RSMo. The Complainant also seeks the Commission's authority to seek civil penalties for these alleged violations of law.

For the reasons stated in this brief, the Complainant has failed to prove the necessary elements of its Complaint.

### **III. Burden of Proof**

As stated above, Section 700.045 by its express terms is a criminal statute. Violation of Section 700.045 RSMo. is a misdemeanor. In other words, to find a violation of Section 700.045 is to find that a misdemeanor has been committed.

In criminal cases, the state has the burden of proving each and every element of the offense, and the burden is not on the defendant to prove any element. State v. Todd, 805 SW 2d 204 (Mo. App. 1991). The state's failure to meet its burden of any element means that a conviction cannot result. Id. at 205.

The state has the burden in every criminal case to prove the defendant's guilt beyond a reasonable doubt. State v. Pendergrass, 869 SW 2d 816 (Mo. App. 1994).

These standards apply to the Complainant's claimed violations of Section 700.045 RSMo. because it is a criminal statute.

It is also the Respondent's position that the "beyond a reasonable doubt" standard applies to the allegations of violations of Section 407.020 RSMo. Section 407.020.3 RSMo. provides that any willful or knowing violation of that section constitutes a Class D felony. Section 407.020.4 RSMo. provides that is the duty of each prosecuting attorney to commence actions under Section 407.020 RSMo. and that the Attorney General has concurrent jurisdiction to commence criminal actions. Nothing in Section 407.020 RSMo. or any other provision of law gives the Director the power or authority to commence actions, criminal or civil, under Section 407.020 RSMo.

#### **IV. Complainant's Claims Under Section 700.045 RSMo. are Barred by the Statute of Limitations**

As demonstrated above, and as is evidenced by the Complaint, part of the Director's claim for relief arises under Section 700.045 RSMo. The Director asks this Commission to find that a violation of Section 700.045 RSMo. occurred in connection with the sale of the Higginbotham Home. Section 556.036 RSMo. provides for a one (1) year limitation period for misdemeanors. Violation of Section 700.045

RSMo. is a misdemeanor. Section 556.036.2 RSMo. provides in pertinent part as follows: "Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods of limitation ... for any misdemeanor, one year."

The Director alleges alternatively that the Higginbotham Home was purchased on May 2, 2002 (See paragraph 14 of the Complaint) or July 10, 2002 (See paragraph 14 of Complaint). However, the Complaint in this case was filed with the Commission on August 5, 2003. Under either of the Director's positions, the Complaint in this case was filed more than one (1) year after the alleged misdemeanor took place, so all claims based on or arising under Section 700.045 RSMo. are barred because of the statute of limitations in Section 556.036 RSMo. The Commission, therefore, should deny all requests for relief by the Director based on or arising under Section 700.045 RSMo.

**V. The Commission Cannot Make a Finding in this  
Case of a Violation of Section 700.045 RSMo.**

For the reasons stated in this section of this brief, no violation of Section 700.045 RSMo. can be found by the Commission.

A. The Commission has no legal jurisdiction or authority to make a finding that Section 700.045 RSMo. was violated.

The Public Service Commission is a creature of the of the legislature and has only the powers which are expressly conferred upon it by statute and those powers reasonably incident thereto. State of Missouri ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 SW 2d 466 (Mo. App. 1980). The Commission has no power to perform "the judicial function." Id. at 468. Among other limitations, the Public Service Commission has no power to determine damages, award pecuniary relief or declare or enforce any principle of law or equity. Straube v. Bowling Green Gas Company, 227 SW 2d 666 (Mo. 1950).



The Public Service Commission has no power to construe or enforce contracts. Katz Drug Company v. Kansas City Power and Light, 303 SW 2d 672 (Mo. App. 1957). Similarly, the Commission has no authority or power to adjudicate and determine individual or personal rights. Id. at 679.

The Commission has no statutory or other legal authority to make a finding of a violation of Section 700.045 RSMo. There is no statutory or constitutional provision that gives the Commission that authority. The power to adjudicate a misdemeanor rests solely in the circuit courts of the state of Missouri. Article V, Section 14, Missouri Constitution; State ex rel. Martin v. Berrey, 560 SW 2d 54 (Mo. App. 1977).

There has been no court or jury finding that the Respondent violated Section 700.045 RSMo., the misdemeanor statute at issue in this case. Unless and until that occurs, this Commission has no jurisdiction or basis or legal authority to sanction Respondent for violating that statute. That simply is beyond the statutory powers of the Commission. If the Public Service Commission purports to make any finding of a violation of Section 700.045 RSMo., it will be acting beyond its authority and will be acting unlawfully.

Respondent respectfully suggests that the proper procedure to be employed under these circumstances would be to have a prosecuting attorney bring an action in state court alleging a violation of Section 700.045 RSMo. If a court or jury then concluded that such a violation occurred, evidence of that violation could be introduced before the Commission, which could then take enforcement action under Section 700.100 RSMo.

In this case, the Director has failed to undertake a necessary step, namely the securing of a conviction of Respondent for a violation of Section 700.045 RSMo. in state court. The Director asks this

Commission to make such a finding, but the Commission clearly lacks the legal power, authority and jurisdiction to do that. It simply is not authorized to do that under any provision of Missouri law.

B. The Complainant failed to meet his burden of proof that the Higginbotham Home was a new home.

As was demonstrated in section I.G. above in this brief, the evidence proved that the Higginbotham Home was a used home and not a new home. Section 700.045 RSMo. by its express terms applies only to new manufactured homes and not to used manufactured homes.

The definition of a "new manufactured home" is contained in Section 700.010 (8) RSMo. That statute is quoted above in this brief on page 10. The fact is that A & G acquired the Higginbotham Home not strictly for resale but for several other reasons. A & G contemplated that the Higginbotham Home may be used for an office or for salvage. The Director failed to satisfy his burden that the Higginbotham Home was a new home.

C. The Director did not meet his burden that the Higginbotham Home did not bear a seal.

A necessary element for a finding that Section 700.045 RSMo. was violated in this case is that the Higginbotham Home did not bear a "seal as required by Sections 700.010 to 700.115." See Section 700.045(2) RSMo. As is demonstrated above, the term "seal" is defined in Section 700.010(13) RSMo.

The statutory definition of "seal" is:

""Seal", a device, label or insignia issued by the public service commission, U.S. Department of Housing and Urban Development, or its agent, to be displayed on the exterior of the manufactured home, or modular unit to evidence compliance with the code."

Under that definition, a seal can consist of two different things. First, it can consist of a "device, label or insignia" issued by the U.S. Department of Housing and Urban Development (a "HUD label"). Second, it can consist of a "device, label or insignia" issued by the Public Service Commission.

As was demonstrated above in section I.F of this brief, there is no evidence that the Higginbotham Home lacked HUD labels when it was sold to the Higginbothams. There simply was not any evidence presented from any exhibit or witness that the Higginbotham Home did not have HUD labels on it on July 10, 2002 (when the home was delivered to the Higginbothams). None of the Director's employees who testified had any firsthand, personal knowledge and therefore could not testify to any such knowledge as to whether HUD labels were on the Higginbotham Home on July 10, 2002.

Equally important is the complete lack of evidence whatsoever in the record concerning the absence of any seal for the Higginbotham Home issued by the Public Service Commission, which is specifically contemplated under Section 700.010(13) RSMo. The record is absolutely devoid of any testimony or documentary evidence concerning the absence of such seals issued by the Public Service Commission on the Higginbotham Home. The only testimony or other evidence that was presented at the hearing concerned the status of the HUD labels on the Higginbotham Home; there was a complete lack of proof concerning absence of Public Service Commission labels on the Higginbotham Home.

For the reasons stated in this section of this brief, the Director completely failed to satisfy his burden to prove that the Higginbotham Home did not have either a Public Service Commission seal or a HUD label. It certainly cannot be concluded that the Director satisfied his burden of proof beyond a reasonable doubt on these points.

D. The Director lacks the legal authority and power to bring an action seeking a finding that Section 700.045 RSMo. has been violated.

The Director does not have any authority in law to bring an action which seeks a finding that Section 700.045 RSMo. has been violated. Under Missouri law, only the Missouri Attorney General and the several county prosecuting attorneys have the legal ability to commence criminal prosecutions. There is absolutely no provision of law which gives the Director the power to do that. Therefore, the Director lacks standing to prosecute claimed violations of Section 700.045 RSMo.

**VI. The Commission Cannot Make a Finding in this  
Case of a Violation of Section 407.020 RSMo.**

For the reasons stated in this section of this brief, no violation of Section 407.020 RSMo. can be found by the Commission.

A. The Commission has no legal jurisdiction or authority to make a finding that Section 407.020 RSMo. was violated.

As is well established and as was cited above in this brief, the Commission does not possess the power to perform the judicial function. State of Missouri ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, supra. Only a court has the legal authority in Missouri to perform the judicial function.

In this case, it would be the essence of the "judicial function" to render a finding that Section 407.020 RSMo. has been violated. To make such a finding is to engage in the act of enforcing and declaring principles of law and adjudicating rights, both of which are beyond the scope of the power and jurisdiction of the Public Service Commission. Katz Drug Company v. Kansas City Power and Light, 303 SW 2d 672 (Mo. App. 1957).

The case law decided under Section 407.020 RSMo. uniformly states that the law leaves "it to the court in each particular instance to declare whether fair dealing has been violated." State ex rel. Webster v. Cornelius, 729 S.W.2d 60, 64 (Mo. App. 1987) (quoting State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 368 (Mo. App. 1973)).

Section 407.020 RSMo. does not itself define deceptive practices. The result is that it is left "to the court in each particular instance the determination of whether fair dealing has been violated." State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d 633 (Mo. App. 1988).

These cases make it clear that it is the function of the judiciary, and not administrative agencies, to interpret Section 407.020 RSMo. and to determine whether that statute has been violated. These cases expressly state that only courts have the power to make this determination. There cannot be any more clear authority that in order to find a violation of this statute, the body making that finding must possess the power to carry out the judicial function.

B. The Complainant lacks the legal power and authority to bring an action for a violation of Section 407.020 RSMo.

Only the Missouri Attorney General and county prosecuting attorneys have authority under law to bring a criminal prosecution seeking a violation of Section 407.020 RSMo. See Section 407.02.3 RSMo. Nowhere in Section 407.020 RSMo. or any other provision of law is the Director given the power to commence a criminal prosecution or civil action under that section.

The Director cannot argue and should not be allowed to argue that this case is a civil action brought under Section 407.025 RSMo. That section authorizes a civil action to be brought for an alleged violation of Section 407.020 RSMo. However, absolutely nothing in the Complaint filed in this case indicates that

this action is a civil action brought under Section 407.025 RSMo. The Director cannot, therefore, rely on Section 407.025 RSMo. as conferring upon him the authority to file an action seeking a violation of Section 407.020 RSMo.

Even if this is the Director's position, again there is no legal authority which confers such power upon the Director. There is no provision of Missouri law whatsoever which authorizes the Director to bring an action under Section 407.025 RSMo.

C. The Director failed to meet his burden to prove that a violation of Section 407.020 RSMo. occurred.

In order to prove a violation of Section 407.020 RSMo., the Director would have to prove that Respondent engaged in "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression or omission of any material fact" in connection with the sale of the Higginbotham Home. Respondent submits that even if the Director has the legal authority to prosecute under Section 407.020 RSMo. (which he does not) and even if the Commission has the power to find that a violation of Section 407.020 RSMo. occurred (which it does not) the evidence does not support a finding that any violation of that statute occurred.

The most clear and convincing evidence in this regard came from Don Higginbotham himself. He testified unequivocally that he and his wife were satisfied and are satisfied with all aspects of the purchase transaction and that they do not have any complaints with respect to the purchase transaction (Tr. 229-31). He also testified that he was not misled in any way as to the condition of the home (Tr. 241). He confirmed that testimony in his deposition as well (Deposition of Don Higginbotham, pages 15-17).

Greg DeLine also testified that there were no unfair practices engaged in with respect to Higginbotham Home. He testified that the home was never represented to them as a new home (Tr. 353). He testified that the Higginbotham Home was not misrepresented to them in any way (Tr. 439-40). In short, there is no evidence before the Commission that any practice or method prohibited by Section 407.020 RSMo. occurred with respect to the Higginbotham sale. All parties to the sales transaction testified that there was no misleading and that there were no unfair practices in connection with the transaction.

It is important to stress that although the Higginbothams filed a consumer complaint with the Commission, that complaint did not allege anything that would fall within the purview of Section 407.020 RSMo. That complaint by its express terms only requested that the Commission, through the Director, inspect the home for damage that occurred during the setup of the home (Exhibit 2). Nothing in that complaint suggests that the Higginbothams believed that any of the sales practices prohibited by Section 407.020 RSMo. ever took place.

## **VII. Conclusion**

The consumers in this transaction, Don and Terri Higginbotham, testified unequivocally that they are completely satisfied with the transaction involving the purchase of the Higginbotham Home. They have no complaints with respect to Respondent or A & G. They have no reason to see this case prosecuted or to have any sanctions entered against Respondent or A & G.

Moreover, the evidence does not support the position of the Complainant that the Respondent violated the provisions of law that Complainant claims were violated. All of the evidence showed that the only seller of the Higginbotham Home was A & G. The purchase contract (the Form 500) by its express

terms did not describe the Higginbotham Home and did not relate to the Higginbotham transaction. The Complainant also failed to prove that the Higginbotham Home was a new home and that it did not have HUD labels or Public Service Commission labels when it was sold.

The chief law enforcement officer of the state of Missouri, the Missouri Attorney General, admitted in writing that no violation of Section 407.020 RSMo. occurred.

In short, there has been a complete failure by the Complainant to prove beyond a reasonable doubt the elements that the Complainant was required to prove. For the reasons stated in this brief, the Commission should find for the Respondent and against Complainant on Complainant's Complaint.

/s/ Thomas M. Harrison

Thomas M. Harrison, Missouri Bar Number: 36617

**VAN MATRE AND HARRISON, P.C.**

1103 East Broadway, Suite 101

P.O. Box 1017

Columbia, MO 65205

Telephone: (573) 874-7777

Telecopier: (573) 875-0017

[tom@vanmatre.com](mailto:tom@vanmatre.com)

Attorneys for Respondent

The undersigned certifies that a complete and conformed copy of the foregoing document was mailed to each attorney who represents any party to the foregoing action, by U.S. Mail, postage prepaid in the proper amount, at said attorney's business address on the July 12, 2004.

/s/ Thomas M. Harrison