

BUILDING AND LOAN: **Withdrawing shareholders not entitled to subsequent dividends or earnings.**

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5604 Law 31

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Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge receipt of your letter which reads as follows:

"A majority of the building and loan associations operating in Missouri have withdrawal notices on file in considerable amounts. Practically all of such notices have been on file for some time and are being paid on a pro-rata basis as the statutes provide.

In the ordinary course of business, it will be quite some time before the notices filed could be paid and it is possible that it would be as long as three years before the full amount of the notices on file could be paid from the usual receipts of the associations.

Section 5604 R. S. Missouri, 1931, governing withdrawals reads in part as follows:

'Many shareholders wishing to withdraw from said corporation, shall, subject to the provisions of the by-laws and its certificate of stock and the limitations hereinafter mentioned have power to do so upon giving one month's written notice * * * * the member so withdrawing * * * * shall be entitled to receive the amount actually withdrawable according to the by-laws of the corporation and the provisions of the certificate of stock.'

A large number of Missouri building and loan associations have by-laws covering the payment upon withdrawal that reads in part as follows:

'Upon withdrawal, the certificate holder shall be entitled to the amount paid in with all dividends that have been declared and credited and in addition thereto interest from the last dividend date to the time of withdrawal at such rate as may be fixed by the Board of Directors.'

Practically all of the officers of Missouri Associations take the position that the shareholders who have filed notices of withdrawal are not entitled to participate in the earnings of the association after the date of filing their notices. This position is also taken by the upper courts of a number of states and is generally considered fair and just.

It seems clear that most of the associations will declare at least two semi-annual dividends and possibly as many as three, four or five such dividends before the last of the notices filed could be paid from the usual receipts of the association.

A great many shareholders who have filed notice of withdrawal have written this Department complaining that the action of the officers of the association in denying them the right to participate in the earnings after the date of their notice is arbitrary and unfair. They have asked for advice as to their rights in the matter.

We will appreciate your opinion in regard to associations, confronted with withdrawal demands they will be unable to meet for a long period of time, being within their rights under the law and the by-law as quoted in denying the shareholders who have filed withdrawal notices the right to participate in such dividends as will be declared in the future while their notices of withdrawal are unpaid."

In your letter you state that "practically all of the officers of Missouri Associations take the position that the shareholders who have filed notices of withdrawal are not entitled to participate in the earnings of the association after the date of filing their notices. This position is also taken by the upper courts of a number of states and is generally considered fair and just."

On September 2nd we wrote you requesting the names and citations of the decisions of these upper courts and on September 6th, 1933, you replied thereto with this statement:

"In reply to your letter of September 2nd, requesting citations on the matter as to whether shareholders on withdrawal in a building and loan association are entitled to dividends, I am handing you the proceedings of the Eleventh Annual Southwestern States Group Building and Loan Conference held at Denver, Colorado, July 18-19, 1933, and refer you to the speech of D. H. Theard on the subject 'Recent Building and Loan Jurisprudence "Way Down South in the Southwestern Group", which reviews this matter rather thoroughly."

We read this speech of D. H. Theard very carefully and could not find anything therein in point. However on page 105 this was said:

"The applicable Louisiana statute contained no rule on the subject, and some associations paid dividends to members on the withdrawal list, while other associations did not.

The Reliance Homestead abolished the payment of dividends to shareholders on the withdrawal list by a new by-law, and claimed the retrospective operation of this new rule."

Mr. Theard then quoted from the Louisiana Court (*Orlando v. Reliance Homestead Association*). We re-quote:

"* * * . . . it seems to me that it would be going a bit too far, in the absence of clear legislative mandate, to require that he should also, in addition to these preferential rights, share in the profits made during the period

required to accumulate a sufficient amount to retire his shares. He cannot eat his cake and have it. Where those who have invested in homestead shares, demand the return of their money, it is manifest that the homestead association must be accorded time to accumulate cash for that purpose. Etc."

And further, quoting from the speech:

"The entire subject matter in Louisiana is now covered by a comprehensive statute on building and loan. * * * * *

We have not been able to find any case in other jurisdictions in point on the subject stated in your letter. It must always be borne in mind that the statutes of Missouri determine the limitations of a building and loan association, consequently if a decision of another court is referable to a statute in that State such decision would not be applicable to Missouri building and loan associations. Missouri's statute covers the point in inquiry. Your letter, however, confuses withdrawing shareholders with that of shareholders who have filed notice of withdrawal.

At the outset we desire to call your attention to Section 5604, Laws of Missouri, 1931, page 155, which provides the time one becomes a withdrawing member:

"Any shareholder * * * wishing to withdraw * * *, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, * * * or at such other time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter."

The above fixes the time one is placed on the withdrawal list and such would be construed and considered the time of making application for withdrawal.

We state the premise upon which this opinion is written, namely, whether or not a withdrawing shareholder is entitled to dividends or earnings of a building and loan association when the withdrawal amount thereof is pro-rated because of insufficient funds on hand applicable to their payment and the withdrawing

shareholder will not be paid until long after he has withdrawn. Above we have defined what constitutes a withdrawing shareholder and this definition should be borne in mind with reference to the premise above stated.

Section 5604, supra, provides in part:

"The member so withdrawing, * * *, shall, if his stock be withdrawable according to * * * be entitled to receive the amount actually withdrawable at the time of making application for withdrawal etc. "

And further,

"Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

Section 5593, Laws of Missouri, 1933, page 183, in dealing with who is entitled to dividends and earnings has this provision:

"There shall be issued to every shareholder a certificate signed by the president and secretary of the corporation, and evidenced by its corporate seal, setting forth distinctly and clearly the class of stock for which he has subscribed, the dividends of earnings which it may draw, and the withdrawal value which it may have at any time, and also the time when the said stock shall be withdrawable. Such certificate of stock together with the by-laws and the provisions of this chapter shall at all times determine the liability of the association to the stockholders and the relations of the stockholder and the association."

Therefore, only shareholders receive dividends and earnings.

The United States District Court in the case of In Re Puget Sound Savings and Loan Ass'n. 49 F. (2d) 922, 1. c. 925, said:

"The shareholders are bound by the statutory provisions and by-laws not inconsistent with the statute."

The Kansas City Court of Appeals in the Appeal of Powell and Doyle, 93 Mo. App. 296, l. c. 300, said:

"The defendant (Equitable Savings and Loan Association) is purely a creation of the statute, having only such powers as the statute gives and such as are necessarily implied. But we have not seen any authority which in the least lends countenance to the suggestion, that when a corporation is clothed with certain limited powers, guarded with the most explicit directions for the manner of their exercise, that it is in the province of such corporation to depart from such direction in the conduct of its business."

Thus, a building and loan association may not have any by-laws that are contrary to the statute and their business shall be conducted in conformity thereto. We look to the statute then to see what a shareholder is entitled to receive when he becomes a withdrawing member. Section 5604, supra, page 155, in part provides:

"The member so withdrawing, * * *, shall, if his stock be withdrawable according to * * * be entitled to receive the amount actually withdrawable at the time of making application for withdrawal etc."

The quoted parts of sections 5593 and 5604, supra, definitely fix the amount a withdrawing member (shareholder) receives, to-wit, "the amount actually withdrawable at the time of making application for withdrawal." For the purpose of argument, assume that a building and loan association has sufficient funds applicable to pay withdrawals and a member withdraws and is paid. Does such withdrawing member receive any further dividends or earnings after he has been paid? Certainly not. Then why should a withdrawing member receive any dividends or earnings simply because the association does not have funds on hands in which to pay him, but, as is required by law, the association must pro-rate the payments.

It is true that a withdrawing member never becomes a creditor of the association but his status remains that of a shareholder, Section 5604, supra. However, such withdrawing member is not a shareholder in the sense that it entitles him to subsequent dividends or earnings but is classified as a "withdrawing" shareholder entitling him to the rights and privileges of such. Thus, when members withdraw the association would have withdrawing and non-withdrawing shareholders. The latter would be entitled to subsequent dividends and earnings for the reason that such members would continue to pay into the association on their dues and obligations and would not have the preferential rights of withdrawing members. Therefore, a withdrawing shareholder is not entitled to earnings or dividends because:

first, when one withdraws, his dues and obligations cease and he puts no more money in the association; second, he becomes preferred over non-withdrawing members as to the funds on hand for payment of withdrawal; third, he would be entitled to share in the profits made during the period required to accumulate a sufficient amount to retire his shares. Thus, to prohibit members from participating in the dividends or earnings after withdrawal, Section 5684, supra, was written into the law limiting such withdrawing shareholders to only "the amount actually withdrawable at the time of making application for withdrawal". If withdrawing members were not restricted to the amount actually withdrawable but allowed to participate in future earnings and dividends then it would be inequitable as between them and non-withdrawing shareholders.

It is our opinion that withdrawing members are not entitled to dividends or earnings of a building and loan association even though the full withdrawal value of his shares is not paid and he receives only a pro-rated amount of same each month.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

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