

# Title Management Today™

## Title Comments™

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This issue of our News Magazine is dedicated to the hazards inherent in providing settlement services. Professor Joyce Palomar and Mr. Bushnell Nielsen have provided resource materials. In addition we have, at the end of this issue, provided some common sense settlement practice guidelines.

### ***Title Insurer's Liability for Acts of its Agent Conducting Escrow***

Several courts decline to hold an insurer liable for its local agent's acts when conducting an escrow or closing.<sup>1</sup> These courts find that the local agent's acts are not included within the

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<sup>1</sup> Universal Bank v. Lawyers Title Ins. Corp., 73 Cal.Rptr.2d 196,198 (Cal. Ct. App. 1997) (holding that an insurer was not liable for its agent's breach of escrow instructions because the agent was not authorized to act as escrow or closing agent on the insurer's behalf); Security Union Title Ins. Co. v. Citibank, 715 So.2d 973, 975 (Fla. Dist. Ct. App. 1998) (holding that an underwriter was not liable for the fraudulent acts of its agent where such acts were outside the scope of the agency and where the plaintiff received a written copy of the underwriter's agency agreement with the agent); Sommers v. Smith, 637 So.2d 60, 62 (Fla. Dist. Ct. App. 1994) (holding that a title insurer was not liable for its agent's acts in conducting a closing where the purchasers failed to allege at trial that the agent's acts were covered by the agency relationship with the insurer); Spring Garden 79U, Inc. v. Stewart Title Co., 874 S.W.2d 945, 950 (Tex. App. —Houston [14<sup>th</sup> Dist.] 1994, no writ) (holding that an insurer was not liable for an agent's escrow acts as such acts were not within the scope of the agency agreement between the insurer and the agent); Cameron County Savings Assoc. v. Stewart Title Guar. Co., 819 S.W.2d 600, 604 (Tex.App. —Corpus Christi 1991, writ denied) (holding that the manipulation of closing documents by an insurer's agent does not make the insurer liable where the agent's authority was limited to issuing title insurance policies); Bodell Constr. Co. v. Stewart Title Guar. Co., 945 P.2d 119, 124 (Utah App. 1997) (holding that an insurer was not responsible for an agent's escrow acts because the agency agreement between the agent and the insurer did not include escrow and closing). Cf. TRW Title Ins. Co. v. Security Union Title Ins. Co., 153 F.3d 822, 829 (7<sup>th</sup> Cir. 1998) (holding that an insurer was not liable to another insurer for its agent's escrow activities where the other insurer failed to investigate the agent and where the other insurer relied on misrepresentations by the agent before entering an agency agreement with such agent thereby assuming the risk for any losses in escrow funds); Fidelity National Title Ins.Co. v. Chicago Title Ins.Co., No. 96-2300, 64 F.3d 656 (4<sup>th</sup> Cir. 1995) (holding that an insurer may be liable to another insurer for its agent's escrow activities if such activities are within the scope of its agency agreement). In the Fidelity case, Fidelity and Chicago were using the same local agent to issue policies. The local agent's mishandling of escrow funds caused a shortage which Fidelity

agency agreement between the insurer and the agent.<sup>2</sup> “In general, the title insurer only has liability for the wrongful conduct of its agent at a closing if the agent acts within the course and scope of its actual or apparent authority as the insurer’s agent.”<sup>3</sup> The scope of the agency between the insurer and its local agent is generally limited to the actual authority to issue title insurance commitments and policies.<sup>4</sup> A local agent may also conduct escrows and closings, but such actions are not necessarily “imbued with either actual or apparent authority to act as such by the title insurer.”<sup>5</sup>

Courts imposing liability on the insurer for the agent’s acts often conclude that such acts lie within the scope of the agency agreement between the insurer and the agent.<sup>6</sup> The New Jersey

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covered pursuant to closing protection letters issued to its insureds. Fidelity claimed that the shortage occurred during a time period when Chicago was the local agent’s only principal. Therefore, Fidelity claimed that Chicago should reimburse Fidelity for the funds paid out to Fidelity’s insureds under the closing protection letters. *Id.* at 676. After this case was remanded, Chicago title moved for summary judgement and its motion was granted. The order granting Chicago’s motion was affirmed in 1997 U.S. App. LEXIS 18024 (4<sup>th</sup> Cir. 1997).

<sup>2</sup> See cases cited *supra* note 232. The Sommers court stated “the fact that a closing agent such as a lawyer or title company might wear ‘two hats’ in selling the title insurance and closing the sale does not make the title insurance company liable for the mishandling of the real estate closing. Sommers at 62. The Spring Garden 79U court commented that actions preceding the issuance of the policy, such as representations to a purchaser and details of a closing and disbursement of funds, do not implicate a company in an insurer’s position. Spring Garden 79U at 950.

<sup>3</sup> Williamson and Herrero, *supra* note 77.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Newman, *supra* note 4, at \*12 (holding an agent’s escrow acts were within the scope of its agency agreement with the insurer where the insurer acknowledged responsibility for its agents’ “handling of monies or documents relating to transactions in connection with the closings of real estate purchases and loans when writing a policy of title insurance”); RTC Mortgage Trust 1994 N-1 v. Fidelity Nat’l Title Ins. Co., 58 F.Supp.2d 503, 538 (D. N.J. 1999) (holding that the insurer voluntarily assumed a duty independent of its obligations in the title policy to assure the lender that its mortgage was a first priority lien). In RTC, the agent, Eastern, had knowledge of prior loans to the borrower secured by first and second mortgages because the agent acted as the borrower’s counsel and as title agent in the prior transactions creating such mortgages. The title commitment issued to the lender did not show the second mortgage on the property. The agent previously recorded the second mortgage and had a file covering the prior loan in its offices. *Id.* at 510-514. Further, the lender’s loan commitment letter required a legal opinion confirming its first lien status subject to the items listed in the title commitment. *Id.* at 511. The closing protection letter issued to the lender stated that its agent would close in accordance with the lender’s closing instructions as they related to the status of title and the enforceability and priority of the lien.

The court reasoned that the closing protection letter at least gave the appearance of apparent authority to close the transaction on the insurer’s behalf. *Id.* at 539. With regards to the insurer’s liability the court concluded that the following acts evidenced the assumption of a

Supreme Court held that the insurer was liable for the theft of funds by the purchaser's attorney where such attorney was also acting as an agent for the insurer in *Sears Mortgage Corporation v. Rose*.<sup>7</sup> In *Sears*, Kaiser contracted to buy Rose's condominium for \$165,000 in August of 1987.

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voluntary duty on the insurer's part: (i) knowledge obtained in searching title and preparing the commitment; (ii) the requirements of the lender assuring its first lien status; and (iii) the language in the closing protection letter. "Title USA engaged in affirmative conduct to assume a duty voluntarily on behalf of [lender], [citations omitted], namely, the duty to assure [lender] that its mortgage was 'in fact' in first lien priority." *Id.* at 538. The court pointed out that liability in the RBC case did not arise out of the closing protection letter as the letter expired by its own terms. "Title USA's duty to assure that [lender's] mortgage was in fact in a first lien position arises out of [lender's] written closing instructions, and the fact that Title USA represented to [lender] that Eastern was authorized to act as Title USA's agent at closing, specifically as to the execution of [lender's] written closing instructions." *Id.* at 539-40. *See also Zabrecky v. Am. Title Ins. Co.*, No. 93-4464, 1994 WL 416286, \*4 (E.D. Pa.) (concluding that a insurer may be liable for the acts of a closing attorney depending on the role and functions undertaken by the attorney and whether such functions were authorized or directed by insurer); *Metropolitan Life Ins.Co. v. First Security Bank*, 491 P.2d 1261 (Idaho 1972); *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993). *Cf. American Title Ins. Co. v. East West Fin.*, 16 F.3d 449, 454-55 (1<sup>st</sup> Cir. 1994) (holding that the title insurance policy included coverage for existing liens not set forth in the policy because the agent for the insurer had authority under its agency agreement to issue policies which failed to list prior liens on the property when the agent had assurances that the funds to pay off such liens would be given to the agent by the insured/lender); *Red Lobster Inns, Inc.*, *supra* note 15, at 941 (holding that the insurer was liable to the insured for the closing agent's acts where a separate contract between the insurer and the insured contemplated the insurer acting as closing agent for purchases across the nation).

<sup>7</sup> *Sears Mortgage Corp.*, *supra* note 237. *See also Clients' Security Fund v. Security Title and Guar. Co.*, 634 A.2d 90 (N.J. 1993) (holding that an insurer was liable for the theft of funds by the purchaser's attorney where the attorney was also determined to be the insurer's agent and where the insurer agreed to indemnify the lender for theft of funds by the purchaser's attorney under a closing protection letter). *Clients' Security Fund* is the companion case to *Sears*. The issues present in *Sears* are also discussed in *Clients' Security Fund*, with the following addition: whether the insurer was subrogated to the lender's rights against the purchaser under the closing protection letter. The insurer claimed that it was entitled to recoup the loss paid to the lender from the purchaser. The court stated two reasons why the insurer could not recover from the purchaser: (i) the purchaser was a putative insured, and thus, the insurer had an independent obligation to the purchaser to indemnify the purchaser for losses occurring from the theft; and (ii) the insurer's subrogation rights are no greater than the rights of the lender to recover from the purchaser, and in this instance, the lender would not be entitled to recover for the theft. *Id.* at 96.

The court noted that the purchase paid the premiums for title insurance twice and in each instance his attorney never submitted the same to the insurer. The court reasoned "an average person in that situation would reasonably expect that his or her attorney, who was also acting on behalf of the title-insurance carrier, would remove all the encumbrances and that the title insurance would protect against any failure resulting in a loss because an encumbrance was not removed." *Id.* The court concluded that the purchaser's expectation was that he would receive coverage for encumbrances and problems affecting his property. Further, the purchaser never

Kaiser's attorney, Gillen, wrote to Commonwealth Land Title Insurance Company on a standard form provided by the company requesting title insurance for Kaiser in the amount of \$165,000. Gillen also requested a mortgage payoff statement from Sears. Commonwealth conducted a title search and sent its commitment to Gillen.<sup>8</sup> Commonwealth never sent a copy of the commitment to Kaiser. The commitment stated that it would be subject to the conditions of Schedule B-1, one such condition being the payment of the Sears mortgage.

On October 16, 1987, Kaiser gave the purchase money to Gillen by endorsing various checks to Gillen. The "Rose to Kaiser" sale took place at Gillen's law office. All parties agreed that Gillen would pay off the Sears mortgage. The next day, Gillen informed Commonwealth that the closing was complete and asked it to issue a fee policy on a form provided by Commonwealth. Gillen failed to pay off the Sears mortgage. In November of 1987, Sears informed Rose and Commonwealth that the mortgage was still unpaid. Commonwealth sent Kaiser a notice that it would not issue Kaiser a title insurance policy without excepting the Sears mortgage. Kaiser demanded a policy be issued without such exception. Kaiser asked the New Jersey Lawyers Fund for Client Protection to reimburse him and the Fund refused as it believed that Kaiser had recourse against Commonwealth. Sears filed a foreclosure complaint and Rose and Kaiser answered and filed third-party complaints against Commonwealth and Gillen.<sup>9</sup>

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received notice from the insurer that he did not have coverage because the insurer communicated with the purchaser's attorney instead of the purchaser. Id.

The court also pointed out that the insurer failed to provide the purchaser with the statutorily required notice which informs any mortgagor of his right to buy title insurance. The court reasoned that if the insurer would have provided the purchaser with this required notice, the purchaser would have been apprised of his lack of title insurance coverage due to his attorney's nonpayment. Id. at 97. Additionally, the insurer failed to advise the purchaser of his right to seek protection under a closing protection letter. Therefore, the court concluded, that the totality of these events made the purchaser a putative insured and on the basis of such conclusion, the insurer was obligated to indemnify the purchaser for any loss relating from the theft. Id.

Concerning the subrogation claim, the court commented:

[A]s the subrogee of the third-party lender, the insurer's claims against the purchaser were no stronger than the lender's claims against the purchaser. The fact that the closing attorney was the agent of the lender for purposes of the closing and the lender exercised the greatest degree of control over the attorney with respect to the handling of the closing funds fairly puts on the lender the responsibility for the ultimate loss arising out of the attorney's theft of those funds. Id. at 98

Therefore, as between the lender and the purchaser, the lender should bear the loss of the attorney's theft and the insurer should bear the loss as between the insurer, lender and purchaser. See generally Robyn Ann Valle, Comment, *Title Waves – New Jersey Supreme Court Decisions Bring a Sea Change in the Insurance Industry: A Comment on Sears Mortgage Corp. v. Rose and Clients' Security Fund v. Security Title and Guaranty Co.*, 47 RUTGERS L. REV. 37 (1994).

<sup>8</sup> Sears Mortgage Corp., *supra* note 237, at 77.

<sup>9</sup> Id. at 78.

The trial court held Commonwealth was liable to Kaiser for breach of its duty of good faith, fair dealing<sup>10</sup> and full disclosure. The trial court also determined that Gillen was acting as Commonwealth's agent and thus, Commonwealth was liable for Gillen's misconduct. The trial court ordered Commonwealth to pay off the Sears mortgage and issue a title insurance policy to Kaiser free of the Sears mortgage. The appellate court reversed the trial court refusing to impose liability on Commonwealth.<sup>11</sup>

The New Jersey Supreme Court began its opinion by stating that the case turned on "the specific relationships between the parties and the roles and responsibilities of the several parties in completing a real-estate-title closing."<sup>12</sup> The court reviewed the principles of agency to determine if Gillen was acting as Commonwealth's agent when he absconded with Kaiser's money. The court reasoned that an agency relationship may be established by the conduct of the parties. "Implied authority may be inferred from the nature or extent of the function to be performed, the general course of conducting the business, or from particular circumstances in the case."<sup>13</sup> Thus, even if someone is not an "actual agent", he or she may be an apparent agent based on manifestations of such authority by the principal.<sup>14</sup> Of significance to the determination of apparent agency is whether a third party has relied on the agent's apparent authority to act for its principal.<sup>15</sup> The court reasoned that direct control over the agent is not decisive, the determination of apparent agency turns on the totality of the circumstances.<sup>16</sup>

In determining whether Gillen was Commonwealth's agent, the court compared the closing practices for a North New Jersey transaction to those for a South New Jersey closing. In South New Jersey closings, a title insurance company employee presides over the closing. The employee maintains escrow funds and disburses such funds at closing. Additionally, the employee undertakes to remove exceptions from the title commitment and accepts the deed, mortgage and other documents incidental to closing. The employee is responsible for the paying

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<sup>10</sup> The New Jersey Supreme Court affirmed the trial court's ruling regarding good faith and fair dealing holding that Commonwealth breached this duty by failing to inform Kaiser that there was an insurable risk of attorney defalcation and in failing to provide or offer insurance coverage for such risk as an incident of the title insurance it was committed to issue. *Sears Mortgage Corp.* at 87. The court discussed the protection against attorney defalcation offered to institutional lenders by title insurers stating that the same protection should have been offered to Kaiser. Commonwealth argued that a closing protection letter covering the defalcation of the funds by an attorney would violate the New Jersey Title Insurance Act as it is in the nature of fidelity insurance. The New Jersey Supreme Court commented that a closing protection letter offered by another insurance carrier was approved by the New Jersey Insurance Commissioner. Commonwealth's form of closing protection letter which it offered to lenders was almost identical to the form approved by the New Jersey Insurance Commissioner. *Id.* at 86.

<sup>11</sup> *Sears Mortgage Corp.*, *supra* note 237, at 79.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 80.

<sup>16</sup> *Id.*

off and discharging of liens and the recordation of any such discharge. The employee also authorizes the issuance of the insurance policy.<sup>17</sup> In North New Jersey closings, the purchaser's attorney performs the same functions as a title employee for South New Jersey closings. The court noted that title insurance carriers must approve the purchaser's attorney in North New Jersey transactions. Further, the title company directs all communication with respect to the purchaser to his attorney. The title insurance company gives instructions directly to the purchaser's attorney. The insurance commitment names the attorney as the "applicant." In addition, if the purchaser's attorney does not pay the premium, the insurance company does not notify the purchaser, it continues to send notification to the purchaser's attorney.<sup>18</sup>

In reviewing the different practices for real estate closings which occur in New Jersey, the court came to the conclusion that Gillen had apparent authority to act on Commonwealth's behalf as evidenced by Commonwealth's control over Gillen. For example, the court observed that all communication was between Commonwealth and Gillen. Additionally, Gillen received blank forms from Commonwealth for his use. In the commitment for insurance, Commonwealth directed Gillen to pay off and cancel the Sears mortgage. Commonwealth sent the commitment to Gillen and billed him directly for insurance premiums. Further, Gillen was an approved attorney for Commonwealth.<sup>19</sup>

Regarding the issue of reliance, the court concluded that "[r]eliance may be imputed when the title insurer, in fact, does not deal with the attorney's client directly, and instead, conducts business through the attorney who is acting on its behalf as well as the client's."<sup>20</sup> Essentially, the court determined that the purchaser is without choice and is forced by the insurance company to rely on the attorney to perform the functions serving the insurer.<sup>21</sup>

In discussing the fact that Gillen was an agent for both the insurer and Kaiser, the court determined that dual representation was not fatal to finding an agency relationship. The conflicts posed by the dual representation created a duty of full disclosure, but they did not prevent the agency as to both principals from forming.<sup>22</sup>

At the end of its analysis the court discussed an additional factor which influenced its decision in finding an relationship between the insurer and Gillen, namely, who, out of all parties in the case, was in the best position to prevent the loss.<sup>23</sup> The court concluded that Commonwealth was in the best position to prevent the loss. Commonwealth's awareness of the risk of attorney defalcation was evidenced by its practice of protecting institutional lenders through the issuance of closing protection letters. "By dealing solely with attorneys rather than with their clients, [Commonwealth] enabled the attorney to mislead or harm the purchaser.

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<sup>17</sup> Id.

<sup>18</sup> Id. at 81.

<sup>19</sup> Id. at 83.

<sup>20</sup> Id. at 82.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id. at 83.

Commonwealth was in a position either to prevent or to protect against the loss suffered by Kaiser.”<sup>24</sup>

In a similar case, the Idaho Supreme Court determined that an insurer was liable for a borrower’s fraud.<sup>25</sup> In this case, the Nays wanted to construct a 4-plex upon their land. They

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<sup>24</sup> Id. at 84. At the end of the Sears opinion, the court set forth suggested measures for title insurers and attorneys in order to avoid the fact scenario posed in Sears:

In its communications, the title-insurance carrier must inform the attorney that he or she will be performing essential functions on behalf of the carrier and will be deemed to be the agent of the carrier, and further, that the carrier will prescribe the procedures for all disbursements. That requirement implicates the problem of potential conflicts of interest and triggers the duty of full disclosure. Hence, the completion of those functions, including that communication, must also be sent to the purchaser. Further, the carrier may prescribe requirements for the approval and control of closing attorneys that will reduce the risks that irresponsible or unqualified attorneys will misappropriate, misuse, or mishandle closing funds. Finally, if the purchaser insists on retaining his or her own attorney, whether or not approved by the insurer, because the risk of attorney defalcation in these circumstances is an incident to the risks covered by title insurance, the title-insurance carrier shall advise the purchaser of that risk and indicate that it is a risk that is or may be covered by the title-insurance policy. We expect that title-insurance carriers will conform their practice to that which they regularly follow with respect to third-party lenders. Id. at 89.

<sup>25</sup> Metropolitan Life Ins. Co., *supra* note 237, at 1263. *See also* First Fin. Sav. & Loan Assoc. v. Title Ins. Co., 557 F.Supp. 654, 663 (N.D. Ga. 1982) (holding that the plaintiff’s allegations that the title insurer was liable for misrepresentations of the lender’s attorneys where the attorneys might also be acting as an agent for the insurer raised a material fact issue); Berkeley Homes, Inc. v. Radosh, 310 S.E.2d 201, 204 (W. Va. 1983) (holding an insurer liable for its attorney agent’s defalcation where the agent was held not liable for such defalcation at trial). The Berkeley Homes decision is of a curious nature. In that case, Jerome Radosh was a bonded agent for Chicago Title Insurance Co. and had authority to issue title insurance policies on Chicago Title’s behalf. The purpose of the bond was to protect all parties to a transaction when Mr. Radosh acted as escrow agent at a closing (this suggests that Mr. Radosh was also an agent of Chicago for escrow purposes). Chicago specifically bonded Mr. Radosh for transactions involving The Kissell Company, a mortgage lender. Id. at 202.

The McCoys decided to buy a home from Berkeley Homes with financing provided by Kissell. Kissell forwarded the loan proceeds to Mr. Radosh for deposit in his trust account. Following closing, Mr. Radosh tendered a check for the proceeds of the sale to Berkeley Homes. The check bounced. When Chicago Title failed to pay Berkeley, Berkeley brought suit against Mr. Radosh, Chicago Title and Kissell. Id. at 202.

After discovering Mr. Radosh’s default, Chicago Title persuaded Radosh and his wife to execute a promissory note and deed of trust to Chicago covering their jointly owned residence as an indemnity to Chicago for any losses it may suffer from Radosh’s nonpayment to Berkeley and others. Chicago never tendered payment to Berkeley. Id. at 202.

The jury held in favor of Mr. Radosh and against Chicago Title and Kissell. Chicago and Kissell appealed the decision because their liability as principals was dependent on Mr. Radosh’s liability.

obtained a commitment for permanent financing from Commerce Mortgage Company. The Nays obtained construction financing from First Security Bank and gave First Security a note and first deed of trust. The deed of trust was recorded on Oct. 10, 1967.<sup>26</sup>

In March of 1968, when construction was completed, the Nays executed a note and deed of trust to Commerce Mortgage. The Commerce deed of trust was recorded on March 14, 1968. Two subcontractors, King and Bell, were not paid for their work in connection with the construction. On March 15, 1968, Title Insurance Company, through its agent Shoshone Title Company, issued a preliminary title report showing the existing deed of trust to First Security and the liens of King and Bell. On March 20, 1968, Commerce paid off the note and deed of trust to First Security. Commerce then assigned all of its rights under the deed of trust and note to Metropolitan Life Insurance Co. Title Insurance Company acted as escrow agent<sup>27</sup> in connection with Commerce's loan and deed of trust and knew that King and Bell had not been paid.<sup>28</sup>

Title Insurance Company prepared a document called "Mechanic's Lien Indemnity" which indemnified Title Insurance Company in connection with any mechanics' liens or bills. Title Insurance Company sent Nay to obtain the signatures of King and Bell on the indemnity. Nay obtained the signatures of King and Bell in exchange for personal checks from Nay. The checks were subsequently dishonored for insufficient funds. King and Bell filed lien

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The Berkeley Homes court, looking at the instructions given to the jury at trial, concluded that no instruction was given to the jury explaining that a finding of liability on the part of Mr. Radosh was a threshold issue to Chicago and Kissell's liability. *Id.* at 203.

The court observed that the jury was preoccupied with whether their verdict would subject Mr. Radosh to double payment (payment once through its indemnity to Chicago and twice if the jury rendered a judgement against him). *Id.* at 203. The court affirmed the jury decision stating:

If there was error committed in this case, it was committed by the plaintiff, Chicago Title and Kissell, in failing to submit instructions to the judge that would appropriately guide the jury in their deliberations. Furthermore, the result in this case is perfect. The party who should pay, namely Chicago Title, is required to pay; the party who was injured, namely Berkeley Homes, is going to get the money that they should have gotten years ago; and Mr. Radosh will either reimburse Chicago or his property will be sold. *Id.* at 204.

It seems that the court's affirmation of the jury verdict was motivated by the equities of the case.

<sup>26</sup> Metropolitan Life Ins. Co., *supra* note 237, at 1262.

<sup>27</sup> It is not clear from the decision whether Shoshone's acts as escrow agent are imputed to Title Insurance Company. The opinion doesn't state whether Shoshone was also authorized to conduct escrows and closings on behalf of Title Ins. Co. The conclusion that Shoshone was so authorized may be implied from the court's statement that Title Insurance Company was the escrow agent for the transaction where the court also stated that Title Insurance Company's title commitment was issued through its agent, Shoshone.

<sup>28</sup> Metropolitan Life Ins.Co., *supra* note 237, at 1262.

claims against the property. Title Insurance Company then issued a title insurance policy to Metropolitan Life as mortgagee.<sup>29</sup>

The Nays defaulted on the loan with Metropolitan and Metropolitan foreclosed on its lien. King and Bell also foreclosed their liens. The trial court ruled that King and Bell's liens were senior to Metropolitan's lien. The trial court also determined that the indemnities were void because they were induced by fraud. Additionally, the trial court concluded that Nay was acting as an agent for Title Insurance Company and Nay's fraud should be imputed to Title Insurance Company.<sup>30</sup>

The Idaho Supreme Court affirmed the trial court's ruling that Nay was acting as the Title Insurance Company's agent.<sup>31</sup> The court determined that Nay obtained King and Bell's signatures by fraud. Regarding the agency between Nay and the Title Insurance Company the court commented:

The instruments were prepared by Title Insurance and Nay was dispatched by it to secure the signatures which would enable Title Insurance to issue an insurance policy for which it could charge a premium. The instruments themselves indicate that they were for the benefit of the Title Insurance Company, and indeed the Title Insurance Company asserted in the lower court that it was entitled to rely upon those instruments to defeat the claim of King and Bell, and sought damages from them on the basis that they had violated the terms of those agreements. Title Insurance cannot now complain of the trial court's ruling of agency and imputed fraud since the record more than amply supports the conclusion of the trial court.<sup>32</sup>

In some situations, courts will impose liability on an insurer in the absence of an agency relationship.<sup>33</sup> Some courts hold, in these instances, that the agents' acts were subsequently ratified by the principals even though they were outside the scope of the agency at the time of performance.<sup>34</sup> Whether the acts in question and the insurer's resulting liability is couched in

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<sup>29</sup> Id. at 1262-63.

<sup>30</sup> Id. at 1263.

<sup>31</sup> See Id.

<sup>32</sup> Id.

<sup>33</sup> *Coldwell Banker Relocation Servs. v. TRW Title Ins. Co.*, No. 95-1801, 74 F.3d 1243 (8<sup>th</sup> Cir. 1996); *Lawyers Title Ins. Corp. v. U.S. Savings Bank*, No. 88-1207-2, 1990 WL 29214 (D. Mass.) (holding that the title insurance policy included coverage for a mortgage lien not set forth in the policy because the insurer ratified the issuing agent's prior exclusions of liens from the policy when the agent possessed the funds to pay off such liens). In *Lawyers Title Ins. Corp.*, an attorney absconded with the funds meant to pay off a prior lien. The attorney's law firm was an issuing agent for Lawyer's Title. The local practice of attorneys was to issue the policy without listing any mortgage liens prior to the pay off of such liens where the attorney possessed the funds to release the liens. Lawyers Title was aware of and had not objected to this practice. Id. at \*2-3.

<sup>34</sup> See cases cited *supra* note 264.

terms of “ratification,” “implied authority,” “apparent agency” or the like, courts tend to impose liability where the insurer is aware of the agent’s acts and in some form or fashion participates in, acknowledges or gives the appearance of consent.<sup>35</sup> The 8<sup>th</sup> Circuit held an insurer liable for acts outside of its agency agreement with a local title company when the insurer had knowledge of the local company’s acts and seemed to acquiesce in such acts in *Coldwell Banker Relocation Services v. TRW Title Insurance Co.*<sup>36</sup> In *Coldwell*, TRW contracted with attorney John McCarty to issue title insurance policies. The agency agreement did not include escrow services. McCarty’s theft of funds designated for a mortgage payoff prompted the lawsuit in that case.<sup>37</sup>

The 8<sup>th</sup> Circuit affirmed the district court’s imposition of liability on the insurer. The court based its decision on the insurer’s knowledge of particular actions by its agent. For example, the insurer knew that McCarty regularly performed escrow services and closings where a policy was issued by the insurer. Further, the insurer knew that McCarty had its logo on its flyer which described McCarty Title Services Company as a “title insurance and escrow agency.” The insurer also knew that the use of McCarty’s services was discontinued by another insurer when McCarty failed to let such insurer audit his escrow account. Additionally, the insurer in this case threatened to terminate the agency agreement with McCarty when McCarty refused to let the insurer audit his escrow account but the insurer failed to follow through on its threat. The insurer also sent a list of transactions to McCarty which forbade the closing of particular transactions, one such transaction being the transaction at issue in the case. Finally, an officer of the insurer suggested that the insurer would continue to indemnify the harms caused by McCarty. Looking at the totality of the facts the 8<sup>th</sup> Circuit concluded that the imposition of liability on the insurer was warranted.<sup>38</sup>

Like the court in *Sears Mortgage Corp.*,<sup>39</sup> some courts consider which party enabled a third party to cause harm.<sup>40</sup> The 10<sup>th</sup> Circuit considered this very issue in *Richards v. Attorneys Title Guaranty Fund, Inc.*<sup>41</sup> In *Richards*, the plaintiff owned several “7-11” stores that he agreed to sell to Snyder. Attorneys Title agreed to issue title policies for the Colorado properties and act as closing agent for the transaction. The plaintiff asked Attorneys Title to hold the sale

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<sup>35</sup> See cases cited *supra* notes 232-264 and accompanying text.

<sup>36</sup> *Coldwell Banker Relocation Servs.*, *supra* note 264.

<sup>37</sup> *Id.* at \*2-4.

<sup>38</sup> *Id.* at \*4-5.

<sup>39</sup> *Sears Mortgage Corp.*, *supra* note 237, at 83.

<sup>40</sup> *Richards v. Attorneys Title Guaranty Fund, Inc.*, 866 F.2d 1570, 1572-73 (10<sup>th</sup> Cir. 1989); *Jacobs v. Chicago Title Ins. Co.*, 709 F.2d 3, 4 (4<sup>th</sup> Cir. 1983) (holding that an insurer and a lender were in a better position to bear the loss caused by a closing attorney’s theft of funds where the attorney represented all parties to the transaction and where the attorney was specifically approved to act as the insurer’s special counsel in the transaction); *First American Title Insurance Co. v. Vision Mortgage Corp.*, 689 A.2d 154, 156-57 (N.J. Super. 1997) (“the title company was in the best position to prevent the loss created by the fraud and defalcation of the Approved Attorney”). See generally H.D. WARREN, *Who Must Bear Loss Resulting From Defaults or Peculations of Escrow Holder*, 15 A.L.R. 2D 870 (1951).

<sup>41</sup> *Richards*, *supra* note 271.

proceeds until all transaction documents were properly recorded. Because the manager of the Attorneys Title branch office was going to be out of town, an employee of Centennial Escrow Services, Inc., Walter, performed the closing. Walter refused to release the sales proceeds to the plaintiff until the transaction documents were recorded. Walter took the sales proceeds to Centennial's office for deposit into an escrow account and made a receipt. Walter left the proceeds and the deposit receipt for Centennial's president, Marshall, to deposit. Marshall absconded with the sales proceeds. Richards sued Attorneys Title.<sup>42</sup>

The 10<sup>th</sup> Circuit affirmed the jury verdict against Attorneys Title. The court reasoned that Section 261 of the Restatement (Second) of Agency was applicable to the facts in Richards. Section 261 states:

A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such persons for the fraud.<sup>43</sup>

The court acknowledged that Section 261 has been applied by Colorado courts in principal-agency cases.<sup>44</sup> Additionally, Section 261 has been applied in several situations involving thefts.<sup>45</sup> The court reasoned that a principal's liability under Section 261 is not based on the nature of the agent's act, "but rather is based upon the principal placing the agent in the position to interact with the third party who is harmed."<sup>46</sup> In concluding that the evidence supported the imposition of liability upon the insurer, the court observed that the jury determined that Centennial was acting within its authority as an agent for Attorneys Title. Accordingly, Attorneys Title was liable to the plaintiff because Attorneys Title placed Centennial in a position which enabled Centennial to commit a fraud upon the plaintiff.<sup>47</sup>

Editor's Note. The foregoing article was prepared by Professor Joyce Palomar. It is an excerpt from her recently released book Patton and Palomar on Land Titles, 3rd Ed., Chapter 20, section 20.04. We thank Professor Palomar for her contribution. This issue is frequently reviewed at the bi-annual ALTA Title Counsel Meetings and new cases are constantly appearing. For those of you who may be interest, those cases may be found under the heading of *Escrow* in the various title counsel agenda contained elsewhere on this web site. Another good source of case law may be found in Bush Nielsen's Text entitled Title and Escrow Claims Guide and Bob Ellis Text entitled Handbook of Title Insurance Law. The reader may also want to review the *Claims Litigation Index Link* that appears elsewhere on the Title Law Associates web site.

Additional supplementary material prepared by Mr. Nielsen entitled *Closing Do's and Don'ts* may be found on the publications link of the Reinhart, Boener, Van Deuren, Norris, &

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<sup>42</sup> Id. at 1570-71.

<sup>43</sup> RESTATEMENT (SECOND) OF AGENCY §261 (1958).

<sup>44</sup> Richards, *supra* note 271, at 1573 [citations omitted].

<sup>45</sup> Id. at 1573 [citations omitted].

<sup>46</sup> Id. at 1574.

<sup>47</sup> Id.

Rieselbach, S.C. law firm web site. We recommend you review that material. Go to <http://www.reinhartlaw.com/articles/re/Closing.pdf>

### ***INTRODUCTION TO SETTLEMENT SERVICE PRACTICE - GUIDELINES***

The settlement agent and closing officer are crucial to successful completion of closing. It is they who are responsible to all parties to the transaction to follow precisely, and without special advantage to one party over another, the written instructions given by them. An accounting should be made of the funds received and disbursed by the settlement agent in the form of settlement statement.

Regardless of the fact that the settlement agent is performing its functions at the request of some third party such as a realtor or one of the parties, the performance must be in strict compliance with written instructions and neutrality. Do not offer advice, do not make any modification of usual and customary charges or prorations to the advantage of one, and do not accept partial or late performance of any party without approval of the other party. Do not vary your performance from the settlement instruction based upon the indemnity of one party.

The settlement statement is the accounting of the money received and disbursed by the settlement agent. This statement should be approved by the parties either by signing the statement itself or by giving approval in a separate document such as the settlement instructions. The settlement agent should retain these records as part of the permanent file.

It is extremely important that the settlement services are coordinated with title insurance requirements. If we are to insure an interest to be created at the closing, the act of closing will commit us to such insurance, unless we have specifically reserved a right to take some additional step. A closing takes place when money and documents have been exchanged and neither party may withdraw from the transaction.

### ***FUNDS RECEIVED AND DEPOSITED***

All checks, money orders or drafts received under a settlement service instruction must be processed for collection in the normal course of business. Such funds must be deposited in a bank, savings bank, savings association or trust company regarded as reputable. The account should be a trust or escrow account segregated from the funds of the settlement agent. Issuing agents or approved attorneys do not have general authority to endorse checks made payable to the company.

No checks or other forms of negotiable instruments are to be held in files or otherwise delayed in collection at the request of the depositing party without written approval of the other party. If collection is not made because of insufficient funds or no account, both parties should promptly be notified in writing. Losses due to delays in processing may be the responsibility of the settlement agent. Such losses may result from bank failure or insolvency or from actions of the depositing party.

The settlement agent must use prudent judgment in the choice of a financial institution in which to deposit the funds of others. Absent specific instructions to the contrary, deposits may be made in a reputable institution chosen by the settlement agent which is FDIC insured.

The account used should be designated as a trust or escrow account. It is proper to commingle the funds of others in this account, but settlement agent must not commingle its own funds in such an account. The settlement agent may not invest the funds without the express written authorization and direction of the parties.

### ***TITLE INSURANCE***

Settlement instructions should not commit us to issue our title insurance policy in advance of the creation of the interest to be insured or in conflict with our current underwriting rules. Correspondence or other non-policy documents should not expand or modify insurance coverage for which a commitment has been issued. Closing a transaction may commit us to insure the interests created. Closing prior to a final title search may provide title insurance over a "gap" period.

Do not accept or act on settlement in which there is an agreement by us to insure a particular interest not yet created or to provide a particular coverage in conflict with our current underwriting rules. Such instructions should not themselves create any title insurance coverage. It is nevertheless proper to accept instructions which authorize the settlement agent to act when we are prepared to issue our title policy providing a particular coverage.

As almost anything in writing issued by a title company agent may constitute an insurance agreement, great care must be taken in correspondence or other non-policy documents not to expand or modify the insurance coverage we are committed to provide or have already provided. Generally there should be a reference such as "subject to the terms and conditions of our title insurance commitment Number \_\_\_\_\_."

Lenders often issue instructions which authorize a loan closing when we are prepared to insure the mortgage as a "valid first lien." The ALTA Loan Policy insures the status of the particular mortgage as set forth therein, and in almost all cases the lien of the mortgage will be subject to some other interests such as restrictions, covenants and easements. Such other matters may be inconsistent with the concept of a "valid first lien" as considered by the lender. Instructions should therefore indicate the exceptions which will be acceptable to the lender.

Closing a real estate transaction by the title company settlement agent may specifically or by implication commit us to insure the title. Insurability of the title as shown in the preliminary commitment is to be considered as a condition to be met prior to closing in all cases. Settlement agent must not close a transaction unless we are willing to so insure.

When a closing has been completed by the delivery of instruments and the disbursement of funds prior to the recording of instruments and confirmation of the title by a record search, we have nevertheless assumed the title insurance liability unless the parties have specifically authorized the closing on such a basis and assume the risks involved. This insurance over the "gap" between the previous title down date and the moment of recording subjects the company insuring over intervening matters. Because of this risk it is essential that all closing affidavits of title be completed.

There are certain procedures which are to be followed whenever, as part of a settlement, funds are escrowed as part of our title clearance procedure. Our basic guidelines for taking and use of settlement escrow instructions are as follows:

1. Instructions must be in writing mutually agreed upon and signed by all depositors or parties to the escrow agreement. DO NOT accept oral instructions.
2. Settlement instructions must be written in clear and understandable language which precisely states our duties and responsibilities. There can be no ambiguity. Any ambiguity must be overcome so there can be no more than one understanding between the parties. Use common sense. If instructions are subject to more than one interpretation further clarification is needed.
3. All contingencies or alternatives of performance should be addressed and covered. You may not later use your best judgment as to the probable intent of the parties.
4. Do not accept settlement or escrow instructions which give you (T.A.) discretionary authority. As an escrow agent we have a duty of impartiality. Any discretionary action undertaken is a breach of our fiduciary duty.
5. Unilateral amendments or revisions or revocations are prohibited. Once an escrow is established, one party may not amend the instruction or agreement or withdraw a deposit without the consent of all other parties to the agreement.
6. Any changes, amendments or revocations of settlement or escrow instructions must be in writing signed by all parties.
7. Do not accept escrow or settlement instructions which commit us to specific title insurance coverage without the opportunity for underwriting consideration.
8. The investment of escrowed funds also requires written instructions to be signed by all parties. These instructions should address who gets the interest.

***The investment of funds is an additional service which involves added risk for which we should receive compensation. Failure to make an additional charge may be an illegal rebate or inducement in violation of RESPA.***

9. Please undertake to use the company's form of escrow in all instances. A copy of the Company's form is attached as Exhibit "A". You should also attach to each escrow agreement a copy of the instructions shown as Exhibit "B". Any deviation from use of company forms should be made only by a senior corporate officer or underwriter.
10. You may not act upon instructions received from third parties on behalf of one of the parties unless such party has been authorized in writing to give you instructions.

11. Don't accept escrows for non-title matters. In doing so you assume fiduciary duties for services which are outside the domain of title insurance.

### ***USE OF ESCROWS FOR TITLE CLEARANCE***

1. When making a closing, funds must be held in escrow for title clearance purposes only. For example, bulk sales clearance certificates, liens, judgments, taxes, pay-offs are all matters for which an escrow can be employed because these items affect title and are for a fixed sum certain. Examples of item for which an escrow is inappropriate are roof repairs, radon testing, completion of improvements, landscaping, etc. These are non-title issues which must be resolved between the buyer and seller under their contract. We're not party to that contract. Don't voluntarily become one.

### ***RULE: FOLLOW THROUGH ESCROW RELEASE PROCEDURES AND PERIODICALLY REVIEW OPEN ESCROWS***

1. Branch office Manager should look at Trial Balance of open escrows each month.
2. Branch office Manager should pull each escrow agreement for open escrow to see if the fulfillment of conditions date has been met.
3. If fulfillment date has not been met, branch office manager should call parties involved to see what the current status of the escrow conditions are.
4. Conditions for extension date should be so noted in file and forwarded to escrow department.

### ***INTRODUCTION TO DISBURSEMENT OF FUNDS***

When funds are deposited with a settlement agent an obligation is undertaken to hold such funds solely for the purposes indicated in the settlement instructions. Do not divert these funds for use elsewhere. Do not disburse funds prior to actual collection by the bank and credited to the account. Drawing on uncollected funds in reliance upon other funds in the account is an improper use of the funds of others.

### ***DISBURSEMENT OF FUNDS***

The disbursement of escrow funds should be done with great care. The settlement closer must be very careful to ascertain that funds are available for disbursement, that the disbursement is authorized and that it is made to the proper party. This is a high risk function due to the pressures of time and personal interest.

### ***AUTHORIZED PAYEES ONLY***

Disbursements may be made only to payees who have been authorized in writing by the party whose funds are being disbursed. Settlement closers must not disburse funds on the authorization of third parties unless an agency for this purpose has been properly established. Direction from real estate agents or attorneys claiming to represent the owner of the funds may

cause practical problems which the settlement closer may need help in solving. Such people do not by their position alone have any authority to direct the disbursement of funds.

***AUTHORIZED AMOUNTS ONLY***

Settlement closer may only disburse amounts which have been authorized by the owner of the funds. We have no discretion as to the amount of money to be disbursed. The owner of the funds must provide us with an authorized specific amount for a formula for calculating the amount.

For example, it could be proper to take an authorization to disburse the customary recording fees or to disburse an interest payment of 8% of \$10,000 for 30 days.

***DISBURSEMENT FROM COLLECTED FUNDS ONLY***

It is our policy that there should be no disbursement of escrow funds except from funds actually collected. The disbursement of funds which are not yet collected is hazardous because the funds may not be collected and we may be disbursing funds which belong to other parties, which is a violation of our escrow responsibility. In some instances the amount to be disbursed may exceed the amount actually in the escrow account and we could have an overdraft situation.

***COLLECTED FUNDS***

Collected funds in an escrow account are those items (checks, drafts or money orders) which have been paid by the bank against or through which they are drawn, our bank has received such payment and credited our account. Items which we have in our possession or have just deposited in our escrow account do not represent collected funds in the sense used here unless we received cash.

Checks, drafts or money orders are devices by which money is transferred from one location to another without the use of cash. Such items all go through a collection process which may require anywhere from one or two days to 10 or more depending upon the banks involved. Generally checks drawn on banks out of state will take considerably longer to collect than those drawn on local banks. Drafts will almost always take one day longer to collect than checks.

Settlement closers should not be misled by the common practice of banks in honoring checks for immediate payment in small amounts on personal accounts. Banks should not be expected to provide us with immediate credit for any checks deposited.

***AVAILABLE FUNDS***

The term "Available Funds" applies to checks or drafts against which our bank will allow us to draw even though they are not fully collected. An "availability of funds" program must be established by special arrangement with our bank. It is not automatic. Our treasurer can assist in making such an arrangement, if it is needed.

Under the "available funds" program we must replace any funds which are not actually collected, and it is generally a program designed to meet the needs of a specific customer rather than a general course of business.

***OBLIGATION OF SETTLEMENT CLOSER TO HAVE COLLECTED FUNDS***

It is the obligation of the settlement closer to so plan and control the closing process that collected funds are available for disbursement. The settlement closer must determine the needs for funds in each closing, anticipate the problems of securing the money, advise the depositors of our requirements for funds, enforce our requirements and follow the necessary procedures to assure prompt collection.

The practical application of these obligations of the settlement closer may require some effort and will certainly require an understanding of the risks and problems of money handling. The above statement of obligation is not intended to ignore the competitive and customer pressures of the market place which may cause us to deviate from the "best" practice to an "acceptable" practice. When deviations from the "best" practice become routine, settlement closers should be increasingly alert to the extra-hazardous case when the deviation must not be followed.

The "best" practice would be to have all checks and drafts deposited with us sufficiently in advance of our disbursement schedule to have actual collected funds in the bank. Any time we issue our check or draft for a disbursement and do not have collected funds in the bank, we run a risk of loss.

Since checks drawn on local banks may take 2 or 3 days for collection, and checks drawn on out of town or out of state banks even longer, our "best" practice would require that disbursements are delayed accordingly. This delay is unsatisfactory in many markets or in many transactions. Nevertheless the settlement closer must be prepared to impose these delays unless the risks of loss are within acceptable limits.

It is almost entirely the responsibility of settlement closer to recognize when the risks go beyond the acceptable limits. Usually only the settlement closer will know who the funds are coming from, the bank on which the checks are drawn, the amounts involved and the schedule for disbursement. Consequently, the settlement closer has a very serious responsibility to evaluate each transaction and ask for the manager's advice in any questionable cases.

The development of an acceptable disbursement schedule prior to actual collection of funds should be established in each office so that the settlement closer is well aware of the rules. The Guide does not intend to set forth specific rules in this regard. However, there are certain factors which should be considered in establishing such rules or in assisting a settlement closer to evaluate each transaction.

These factors are as follows:

1. All checks or drafts are only items in collection until actually paid. None of these items represent "instant" credit.
2. Certified checks, cashier's checks or money orders are not the equivalent of cash. These items carry less risk of failure of collection, but they do not represent funds

upon which we may secure immediate cash from the bank. Certified checks and cashier's checks are subject to being stopped, may be forged and are dependent upon the integrity of the bank for payment.

3. Personal checks and payroll checks are of higher risk than others because they may be stopped so easily, and at least the personal check may have the problems of "no account" or "insufficient funds".
4. The wire transfer of funds into an escrow account can produce collected funds within a few hours ordinarily and when receipt has been confirmed by our bank, may be drawn against without delay.
5. Checks of lenders and well known companies are a better risk than checks from individuals. An evaluation of the worth and integrity of the maker of the check is very important.
6. The amount of the check is to be considered both as to the risk of collection and the amount of loss we are willing to accept if the check is not collected. A personal check for \$250 is much more likely to be collectable than one for \$100,000. Also we are much more willing to accept a \$250 risk than one for \$100,000.
7. Since our disbursement check may be cashed or collected within a few days, will that disbursement in fact over draw our escrow account or jeopardize other transactions while we are waiting for our deposit to be collected. (For example. You are to disburse a \$4,000,000 loan the same day you deposited the lender's check drawn on an out of state bank. The check may be considered absolutely good, but an immediate draw of \$4,000,000 on our escrow account could jeopardize other closings and probably over draw our account.)
8. You should not make any disbursement unless the checks to provide the funds have been received by us.
9. Drafts take 24 hours longer to collect than checks and are almost always conditioned the approval of the maker as to some other matter such as the loan package. This increases the risk to us.
10. Where we accept a large personal check after verification of sufficiency of funds the closer should go to the bank upon which the check is drawn and exchange the check for a treasurers check.\* When in doubt, about a check, a telephone call to the bank against which it is drawn may verify the account and at least a present balance sufficient to cover it.
11. Our disbursement checks should not be delivered unless it is reasonably anticipated that we will have collected funds in the escrow account by the time our checks are charged against our account.

\*Write on the back of the check to be exchanged "Without Recourse"

Comment: The settlement closer must use considerable planning, initiative and judgment in order to properly operate within our guidelines and yet maintain customer service which is satisfactory. This is not an easy assignment, but is nevertheless an important one. Settlement closers should consult with the local manager about any problems.

***WIRE TRANSFERS, CASHIER'S CHECKS OR CERTIFIED CHECKS***

Do not disburse by wire transfer, cashier's check or certified check unless you have actually collected funds in the escrow account.

***DISBURSEMENT FROM SAME BANK AS DEPOSITED***

Disbursement of funds should be from the same bank account into which they have been deposited. Do not place the funds in one escrow account and withdraw them from another escrow account.

***RECONCILIATION OF FUNDS RECEIVED AND DISBURSED***

Prior to disbursement of funds you should reconcile the receipts and proposed disbursements. Obviously you should not disburse more money than you have received.

The reconciliation can be made by listing all the funds received and the checks to be issued. The two totals should be equal. If they do not balance, you should review the settlement statement for an error.

The over disbursement of escrow funds is a chronic problem caused by errors in the settlement statement. These errors consist of understating an item or in not showing an item in the settlement statement which we have to pay as a condition to the closing.

If you in fact over disburse the escrow funds received, it is your obligation to take at least the first steps of trying to secure reimbursement. Our mistake does not ordinarily excuse the responsible party from the obligation of payment. Prompt action on your part will increase the chances of recovery.

You should report any over disbursement to the office manager or the accounting department. Such items should be treated as accounts receivable and the escrow account reimbursed by our funds.

***CHECK REQUESTS***

Escrow checks should be prepared within the settlement services section and requested by the responsible settlement closer. The local system may involve the settlement closer as one of the check signers.

A check request form should list the checks to be issued and reflect the total amount to be issued. Preferably the request form should also reflect the funds received, but this is not a necessity. If the receipts are also shown, the form can function as the reconciliation statement.

Preferably escrow checks should be approved or have a second signature (check protector) by someone who verifies the receipt of funds into the account. This approval might be accomplished by the accounting department.

### ***STOPPAGE OF PAYMENT***

Do not stop payment of a disbursement check without consulting with the office manager or local counsel.

### ***ENDORSEMENT OF CHECKS TO THIRD PARTIES***

Do not endorse checks made payable to the Company to third persons. Such a practice is prohibited by the by-laws of the Company and is contrary to good business practice.

In some rare instances we receive checks made payable the Company in error. In other cases we may have some doubt about an immediate disbursement based upon the check. In either case the settlement closer should not endorse the check over to a third party. The check should be returned to the maker for reissuance or put through for collection and subsequent disbursement.

### ***DISBURSEMENT A CONDITION OF THE CLOSING***

The disbursement of funds is usually one of the conditions of a closing. Earlier in this section we noted that the disbursement of funds should be done only at the authorization of the owner of the funds. While this is true, it must be recognized also that the party has an interest in many of the disbursements. As a result the owner of the funds may not avoid a disbursement altogether.

It certainly may be a condition of a closing that taxes are paid or a mortgage is paid off by the seller. The seller whose funds are used should approve the amount of payment, but the buyer must have performance that releases the lien of the taxes or the mortgage.

Consequently, if a seller does not want to pay off a lien at the time of the closing, then a security deposit might be agreed upon to protect the buyer and the settlement agent. The terms of holding such a deposit in lieu of an immediate payment of the lien must be agreed upon by the buyer as well as the seller.

### ***TREATMENT OF OVER DISBURSEMENT***

The over disbursement of funds in a particular closing may occur because of a shortage of funds received, an over payment of an amount due, an under statement of an item of expense on the settlement statement (resulting in an over payment to the seller) or the omission of expense item from the settlement statement. In whatever manner the over-disbursement occurs, it is the responsibility of the settlement closer to act promptly to secure additional funds from the party who owes the amount or to recover funds paid in error. Timely action by the settlement closer may well avoid a substantial loss.

An error by the settlement agent in calculations or failure to collect enough money from one of the parties does not excuse that party from the obligation of payment. Settlement closers should not hesitate to assert our rights in this regard. Sellers may be difficult to secure money from once they have left town, but this should not excuse an attempt. (Note: It is a good idea to always get the seller's address after the sale.)

Settlement closers should recognize that some errors are to be expected. It is not a sign of weakness to acknowledge a mistake. If there is some concern as to how a real estate broker or a customer might react, the settlement closer should ask for help from the office manager.

Once an over disbursement is established and is not recovered within a reasonably few days, the file should be closed by advancing our company funds to make up the shortage and an account receivable created. The account receivable may then be treated and collected as any other receivable.

Note: The escrow account of an individual file should not be left in an over disbursed state for more than a few days. The exact length of time is a matter of some discretion, but it should not exceed 30 days ordinarily. Clearly it is the responsibility of the settlement closer to monitor these accounts for action.

**CAUTION:** It is the responsibility of the settlement closer to deliver incoming funds to the cashier or other person in charge of making bank deposits. Receipts must be deposited promptly. Do not hold up deposits while waiting to process the file after a closing.

### ***FAILURE OF FUNDS***

Checks returned for "no account" or "insufficient funds" require prompt attention by the settlement closer. If the check is marked "no account", advise the maker of the check of the problem to secure a replacement. If the check is marked "insufficient funds", advise the maker and receive additional instructions as to how to collect the funds.

If the check returned was to provide funds by a particular time as a condition of the escrow and the time for performance has passed, the other party must be notified and such party must provide written instructions directly to the settlement agent of how to proceed further.

If the time for performance has not passed, it would not be necessary ordinarily to give the other party any notice of the return of the check. If it is apparent that the maker of the check is unable or unwilling to perform, the other party should be so notified promptly.

If the check is returned subsequent to disbursement of the funds, a prompt follow up to the maker is required and the office manager should be notified. Settlement closers should not stop payment on our own checks without consulting with the office manager.

### ***ABANDONED DEPOSITS***

Funds or other personal property such as letters of credit or securities held in escrow may be unclaimed or abandoned by the true owner due to forgetfulness or lack of knowledge and such

property is usually governed by state statutes. Many states have enacted a version of the Uniform Disposition of Unclaimed Property Act which provides us an ultimate solution that such property is taken by the state.

The Unclaimed Property Acts of the states may vary considerably so that you should consult with office counsel for detailed requirements of your state. Furthermore it is likely that the presumption of abandonment does not arise for a number of years (7 under the Uniform Act) after the deposit would be payable to the owner.

### ***NATURE OF ABANDONED DEPOSITS***

Probably most unclaimed deposits of any significant amount will result from indemnity or security funds held by us. After the passage of time it may be difficult to locate the owner.

Other unclaimed deposits result because excess funds were held pending an accurate determination of charges and the owner cannot be located when the balance becomes payable.

Still other amounts may result when one of our disbursement checks is not cashed and we are unable to contact the payee to complete the disbursement.

### ***FEES AND EXPENSES FOR DEPOSITS***

By their nature an unclaimed deposit is one that is held beyond the time limits of the original escrow instructions. It is therefore proper and appropriate to charge annual or periodic fees and expenses for holding the deposits beyond the original term for the transaction.

Such deposits should be subjected to at least an annual review and attempt to locate the owner. This process and other expense factors justify a fee to be charged in advance.

### ***COMPANY POLICY AND PROCEDURES***

Every office should review their trial balance of all open escrow transactions and outstanding check listing to determine which transactions are held beyond the time limits of escrow instructions and report the same to the escrow department.