

Settlement Procedures for Title Agents

*The Do's and Don'ts to
Avoid Liability in Providing
Settlement Services*

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THE ROLE OF SETTLEMENT SERVICES PROVIDER VERSES THE ROLE OF TITLE AGENT AS A POLICY ISSUING AGENT

In the typical agency contract that a title agent enters into with an Underwriter, the title agent or agency is the agent of the Underwriter for the purpose of issuing the Underwriter's commitments, policies and endorsements.

- An Agent's conduct in providing settlement services is not covered under the agency contract; thus, an agent providing settlement services is acting beyond the scope of agency / underwriter relationship.
- As a result, the title agency that provides settlement services is exposed to potential liability and assumes additional responsibilities as a settlement service provider.

THE ROLE OF SETTLEMENT SERVICES PROVIDER VERSES THE ROLE OF TITLE AGENT AS A POLICY ISSUING AGENT

- If the agent's conduct falls below the applicable standard or if the agent makes a mistake, when providing settlement services, the agent may incur liability for negligence and may need to place its errors and omissions carrier on notice and engage counsel.
- An exception to the rule, however, may be issues related to the CPL which does provide some coverage for settlement related issues or practices and may expose the underwriter to possible liability.
- Although the NJ Rate Manual addresses the activity and fees associated with settlement services, Section 1.10 of the Manual states the following: *"Nothing contained in this Manual shall be construed to extend the authority or scope of agency of a Title Insurance Agent beyond that which is set forth in its contract with an Insurer"*.

LENDER'S INSTRUCTIONS AND PREPARATION OF THE C/D OR SETTLEMENT STATEMENT

Any deviation from the Lender's closing instructions may result in additional liability for the settlement services provider or for the Underwriter under the CPL. The Lender's closing instructions are sacrosanct and should never be deviated from unless you obtain written instructions from the Lender.

- Seller concessions are beyond the scope of coverage afforded by title insurance policies and the CPL and in some circumstances may be considered mortgage fraud.
- Seller concessions may be acceptable to the Lender if they are fully disclosed, properly reflected on the C/D or settlement statement and written authorization is obtained.
- Do not accept requests to make Seller payoff additions to the C/D or settlement statement that are not part of the insured transaction.

LENDER'S INSTRUCTION AND PREPARATION OF THE C/D OR SETTLEMENT STATEMENT

- Do not be involved in off-the-record deals or schemes or in those deals done outside of closing. If it is done outside of closing and you do not have knowledge, it is not your concern.
- All expense items, mortgage payoffs, lien payoffs, fees, etc., that are on the C/D should be supported by an invoice.
- For HELOCs, in addition to obtaining a payoff, require a freeze letter indicating that the borrower is no longer able to draw against the line of credit. Zero-out letters are not sufficient.
- For private mortgages shown on the C/D, obtain notarized payoffs and require that the discharge of mortgage be submitted prior to closing and payment.
- It is imperative that all documents are properly executed and promptly returned to the Lender along with all Lender funds.

THE CLOSING PROTECTION LETTER:

The CPL provides a lender of an Insured Mortgage or a borrower or all-cash purchaser in a one-to-four family residence, with certain protection against fraud, misappropriation of funds or failure to follow written closing instructions by the Settlement Service Provider.

- Do not issue a CPL if the mortgage lender is not an institutional lender or if the Seller is “taking back” a mortgage.
- Do not issue a CPL if the transaction does not involve mortgage financing. Exception: cash purchasers purchasing a 1-4 family residential property.
- Never issue the CPL to a Seller or to a party not protected under the CPL.
- Never issue a CPL where a commitment has not been issued.
- Never issue a CPL on a property located outside the State of New Jersey.
- Never issue a CPL to an Attorney that represents the Lender or the Seller or issue to someone who is not a settlement provider.

THE CFPB, TRID AND FEES:

On October 10, 2015, the TRID rules went into effect.

- Under RESPA, the term “Settlement Service” is interpreted broadly. It includes any service provided in connection with a real estate settlement.
- Thus, if you are conducting settlements as a title agent and preparing the CD or HUD you are a settlement service “provider” and subject to the rules of the CFPB and RESPA.
- Under section 8(a) of REPSA, a settlement service provider may not, pursuant to an agreement or understanding, provide payment or receive a gift (thing of value) for the referral of settlement business.

THE CFPB, TRID AND FEES:

- Section 8(b) of RESPA prohibits the splitting of any charges or fees related to a real estate settlement with someone who has not actually performed a service.
- Other prohibited conduct, besides fee splitting, is the mark-up of the cost of services performed, getting paid unearned fees, and overcharging for excess fees for services performed.
- TRID requires that the preparation of the CD and the HUD must be done accurately and honestly. Do not forget, the preparation of false settlement forms may result in severe penalties under RESPA.
- Fees permitted under the NJTIA are set-forth in the NJ Rate manual. Any title fees charged in New Jersey must be in compliance with the NJ Rate Manual and fees may not be waived.

THE UNAUTHORIZED PRACTICE OF LAW

- The Opinion 26 decision made it clear that at the time that the purchasers and sellers enter into the contract of sale, the purchasers and sellers must sign the “Broker Notice” aka the “right to counsel” notice and that the notice should be attached to the contract of sale that was presented to the parties by the real estate broker.

IMPORTANT STEPS TO TAKE TO PROTECT YOURSELF:

1. Request a copy of the Broker Notice for your file. If the Broker Notice was not given, either delay or cure. You are required to make this inquiry.
2. Regardless, of whether the Broker Notice was supplied on not, get your own copy of the form signed and keep it in your file for future reference.

THE UNAUTHORIZED PRACTICE OF LAW

IMPORTANT STEPS TO TAKE TO PROTECT YOURSELF CONTINUED:

3. A title company or agent may not prepare documents.
4. If you, as the title agent, engage an attorney to prepare documents for a party not represented by counsel, you must obtain a specific written request of the party on whose behalf the document(s) is to be prepared.
5. A title company or agent may not practice law and must refrain from giving legal advice or opinions.
6. Practicing law includes participation in the clearing of certain legal objections to title.

WHAT ADVICE IS NOT PERMISSABLE ?

What procedure or steps should a settlement officer follow when confronted with questions at settlement that may cross the line into the realm of legal questions or legal advice?

1. **Don't give your opinion:** If you are confronted with a complex question wherein a party requests your opinion regarding the implication of a particular exception, or asks a question regarding the scope of coverage, you must refrain from giving an interpretation of the issue or in giving your opinion regarding the matter.
2. **Advise party of their right to counsel (again):** Although you must not give your opinion, you must advise them of their right to counsel, at which point they, the party, may adjourn the closing, may delay the closing and contact or call an attorney for advice or the party may state that they prefer to continue the closing and would rather not seek counsel.

WHAT ADVICE IS NOT PERMISSABLE ?

Procedures or steps continued:

3. **Get them to sign a statement:** After being advised by you of their right to get a legal opinion, the settlement officer, should require that the party sign a statement that you advised them that if they want an opinion regarding the complex issue, they have a right to contact an attorney or adjourn the closing and has decided not to do so.
4. **Don't close:** What if a legal issue arises and it can't be resolved? Don't say let's get it closed now and we can worry about that issue on Monday. If the issue is outstanding and the parties are not willing to sign a statement that despite the legal issue they wish to proceed to closing, don't close

BULK SALES AND CLOSING:

What is Bulk sales and why does it matter at closing?

- Tax on the sale or transfer of an individual or company's business assets.
- Issue when a person or an entity sells business assets, and the sale is not in the “ordinary course of business”, or it is a rental property with more than two units.
- The purchaser is responsible for reporting the sale to the Bulk Sales Division even though the tax is based upon the seller’s assets.
- The purchaser must report the sale using form C9600 and submit it with a copy of the contract at least 10 business days before the closing date.
- The purchaser must submit the documents by certified mail or overnight mail service.

BULK SALES AND CLOSING:

- Bulk Sales is not a title issue and is not a lien but is a settlement service issue.
- Do not escrow for Bulk Sales, unless you receive an escrow letter from the Bulk Sales Unit.
- Impossible to know which taxes the State will attempt to collect.
- Bulk Sales unit does not look kindly upon those who circumvent their rules.
- Do not offer to hold proceeds pending receipt of the letter from the Bulk Sales Unit.
- Settlement Agent must know in advance who is taking care of obtaining Bulk Sales clearance.
- Do not accept a hold-harmless from the parties.
- If the parties are not certain whether Bulk Sales applies, insist Buyer submit forms.

FIRPTA AND CLOSING:

What is FIRPTA and why does it matter at closing?

- FIRPTA is a withholding tax, either 10% or 15% of proceeds, from the gain made by foreign individuals and corporations on the sale of a US real property interest.
- In order to accomplish the collection of this tax, the Act imposes a withholding requirement upon the proceeds of the Seller in the sale of a real property transaction.
- FIRPTA is part of the federal tax code and will apply to most “closings” wherein the Seller is a foreign person. Thus, anyone who is neither a US citizen nor a resident alien.
- The Act does not apply, however, to transactions where the sales price does not exceed \$300,000.00 and the Buyer intends to use the property as a residence.
- Since it is not title, one should not set-up any requirements or exceptions related to compliance with the Act in the commitment. No affirmative coverage.

FIRPTA AND CLOSING:

- Not a title issue and not a lien on real property. If FIRPTA clearly does not apply, get the Non-Foreign Person Affidavit signed. Always verify.
- If the settlement provider takes any responsibility for FIRPTA compliance, they may be fined and held liable for not collecting it if it in-fact it applies.
- Make a decision early on in the process whether FIRPTA applies and get attorneys involved and request that the parties complete the required forms.
- Determine who the withholding /escrow agent is going to be and collect the tax on the CD or HUD. Direct payment to the withholding / escrow holder. Get Notice signed.
- As the settlement service provider do not make FIRPTA calculation or complete documents. Encourage the use of a firm that specializes in being a FIRPTA escrow holder.
- What if seller does not have a TIN? How do you close without it?
- If Substantial Presence Test applies, get a letter from the Seller's CPA.
- Single member LLCs may be subject to FIRPTA.

C/O AND FIRE/SMOKE DETECTOR INSPECTIONS:

- Many municipalities have adopted ordinances requiring a C/O to be obtained prior to closing. Some adopted ordinances indicate that a party who closes without a C/O may subject themselves to criminal liability.
- You should never agree to close without C/O or hold an escrow regarding C/O related items. There is no method of determining what may ultimately be discovered in an official municipal inspection. If the closing is completed and there is not enough money being held in escrow, you may be stuck.
- The lender's instructions will typically require compliance with the obtaining of a C/O if the municipality requires one and the smoke detector inspection is mandated in every New Jersey municipality.

C/O AND FIRE/SMOKE DETECTOR INSPECTIONS:

- Smoke detector inspection is non-negotiable.
- Under N.J.S.A. 52:27D-192 *et seq.*, a C/O may not be issued unless the proper number of Smoke detectors are installed.
- N.J.S.A. 52:27D-133.3 requires carbon-monoxide detector installation unless you can show otherwise.
- One should not give the impression that the title company is insuring compliance with the statute or administrative regulations, even where a certificate from a municipal official has been obtained.
- Do not provide affirmative insurance regarding compliance with these issues. Governmental police powers are excluded under the policy.

INSPECTION AND WALK-THRU ISSUES:

- As with Certificates of Occupancy and fire inspections, you should never agree to hold an escrow regarding inspection and walk-thru issues.
- If the closing is completed and there is not enough money being held in escrow, the parties, whether rightly or wrongly, will bring you into any subsequent litigation.
- Do not get involved in any negotiations between the purchaser and sellers regarding these issues. Do not knowingly become part of any off-the-sheet or non-disclosed deals.
- If the parties attempt to drag you into their issues regarding inspection and walk-thru issues and they are not represented by counsel, offer to have the parties sign a Right to Counsel form (again if necessary) advising them of their right to stop or postpone the settlement to seek Counsel regarding the issue.

DRY CLOSINGS:

- An escrow closing, sometimes referred to as a dry closing increases the risks assumed by the settlement service provider and title company. Remember, even though the parties may think that they have had a closing, until the deed is delivered, title has not passed.
- The closing is, thus, not completed and is subject to numerous unforeseen concerns that may lead to unpleasant litigation or to a potential claim.
- An agent who conducts a dry closing will inevitably be made a party to any litigation if during the closing period, someone dies, a party declares bankruptcy, a party is declared incompetent, documents are lost or never arrive, or intervening liens get recorded.

CALCULATING TAX RELATED CHARGES: RTF, GIT/REP, MANSION TAXES

- These issues are not title related, but rather are tax issues and as such are outside the scope of the title policy. A settlement service provider should not provide tax advice or opinions.
- A settlement services provider should not be making the calculations for the parties regarding these tax matters, especially when the parties are represented by Counsel. It is a slippery slope that must be managed carefully.
- The parties will be quick to blame the agent if the documents don't get recorded because of the failure to provide accurate calculations or if you informed someone that a transaction was exempt, when in fact it was not.
- You should not take a position on whether any particular transaction is or is not exempt from the Realty Transfer Tax (RTF) or Gross Income Tax withholding.

SETTLEMENT AND THE GOOD FUNDS LAW:

- New Jersey's Good Funds Law may be found at N.J.S.A. 17:46B-10.1. The law essentially states that disbursements can only be made against good funds. Good funds are collected funds.
- N.J.S.A. 17:46B-10.1 2b: No title insurance producer or company shall disburse funds representing closing or settlement proceeds of a real estate transaction unless those funds shall have been deposited in a separate trust or escrow account by cash, electronic wire transfer, or certified, cashier's, teller's or bank check, or other collected funds.
- The same applies to New Jersey Attorneys-at-Law. Reconciliation of trust accounts is extremely important to limiting mistakes and stopping fraud.
- Also pursuant to N.J.S.A. 17:46B-10.1 2b, a New Jersey licensed attorney's trust account check and a trust or escrow account check from a New Jersey licensed insurance producer shall be considered "collected funds".

WIRES, DISBURSEMENTS, AND CYBER FRAUD:

- Every set of wiring instructions must be verbally confirmed from a known and reliable source.
- Never accept changes to wiring instructions without contacting the alleged sender of the request or message by telephone for confirmation, using an independently confirmed telephone number.
- Never send a wire after checks have been issued. Even if the party promises to return the check(s) to you.
- Only disburse funds in the name of the Seller.
- Avoid requests to send seller's funds to an attorney's trust account.
- If there are Back-to-Back closings, i.e., a sale in the morning with a buy in the afternoon, under statute, a title agency trust account check or an attorney trust account are considered "collected funds", i.e., "Good Funds".
- If funding authorization is required submit required package for lender approval. Do not fund until approval obtained.

REGISTRATION OF ABANDONED PROPERTIES:

- Many Municipalities in New Jersey collect lists of abandoned and vacant properties and have sought to collect registration fees upon the owners based upon this list.
- The collection of the fees is pursued through the enactment of ordinances.
- Municipalities have attempted to impose fines and penalties for the failure of the owner to pay these ordinance-based registration fees.
- Despite the lack of statutory authority in NJ, many municipalities are treating these fines and penalties as liens.

REGISTRATION OF ABANDONED PROPERTIES:

- As a result, these “so-called” liens may result in liability that extends to purchasers. The question to ask is: are these liens shown on the official tax search?
- If your municipal tax search discloses any notes pertaining to vacant or abandoned property registration fees, you must contact the municipality to confirm the status of this lien.
- Most Municipalities will require payment of the registration fees.

FRAUDULENT LAND SALES:

- These scams can involve the sale of a house or other type of real property, but generally focus on the sale of a vacant lot that is owned free of encumbrances and liens. There has been an increase in the number of attempted fraudulent land sales nationwide, but also here in New Jersey.
- Please see Stewart Bulletin No. SLS2023003 issued on January 30, 2023. If you are providing Settlement Services, you must do your due diligence to protect yourself and to protect the underwriter.

Be aware of the red flags:

1. The “Scammer” has usually done online research and is familiar not only with the property itself but also with real estate transactions in general. The purported seller therefore is usually able to discuss the proposed transaction with a high degree of accuracy.
2. The settlement services provider must use a “confirmation letter” sent to the seller by regular mail to the address on file with the county tax assessor. This simple act has proven to be highly effective in preventing fraud.

THE LAST LINE OF DEFENSE ISSUES:

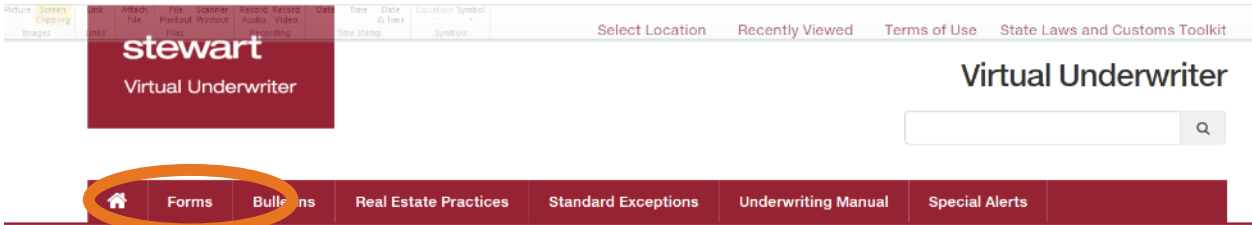
- The Notice of Settlement (NOS) must be filed for every transaction. The NOS is good for 60 days and a second one may be filed for an additional 60 days.
- The title rundown search should be ordered 24 to 48 hours prior to closing.
- The cover record search must be done prior to issuing your policy.
- Avoid delays in recording. Delays in recording may result in intervening liens gaining priority over our insured documents.
- Avoid delays in policy issuance.
- Use your commitment as a check list. Review it prior to leaving the closing table. Have all requirements been met?
- Proper Identification is always required, i.e., photo ID.
- When necessary, pick-up the phone.



**Thank you for attending.
Please join us next
month for “RAILROADS”**

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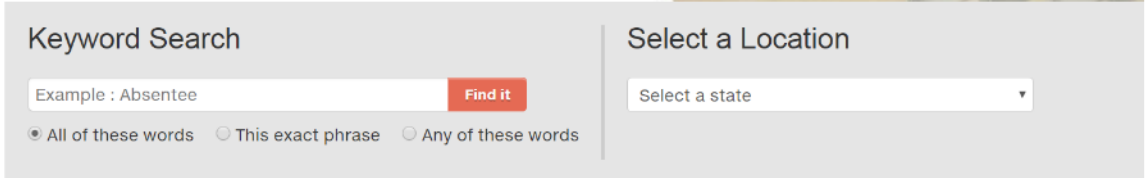
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The screenshot shows the top navigation bar of the Stewart Virtual Underwriter website. On the left is the Stewart logo with the text "Virtual Underwriter". To the right is a search bar with a magnifying glass icon. Below the search bar is a dark red navigation menu with several items: a home icon, "Forms", "Bulletins", "Real Estate Practices", "Standard Exceptions", "Underwriting Manual", and "Special Alerts". The "Forms" and "Bulletins" items are circled in orange.

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This section contains two search-related components. On the left is a "Keyword Search" area with a text input field containing "Example : Absentee", a "Find it" button, and three radio button options: "All of these words" (selected), "This exact phrase", and "Any of these words". On the right is a "Select a Location" area with a dropdown menu labeled "Select a state".

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