



BuchalterNemer
A Professional Law Corporation

ESCROW INSTRUCTIONS AND TITLE INSURANCE: FIVE CRITICAL ISSUES AND THREE TRAPS TO AVOID

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Joffrey Long

**12:00 Noon PST
September 13, 2016**

Webinar

Buchalter Nemer

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

ESCROW AND TITLE INSURANCE

- 1. Why do you want title insurance coverage?**
- 2. Does the escrow go hand in hand with title insurance?**
- 3. Is your loan or owner's policy appropriately endorsed?**

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A TITLE INSURANCE POLICY IS SIMILAR TO A HOUSE.

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BUT A TITLE INSURANCE POLICY WITH NO ENDORSEMENTS IS A HOUSE WITH A HOLE IN THE ROOF.

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UNLESS YOU LIKE HOLES IN YOUR TITLE INSURANCE POLICY, YOU SHOULD CONSIDER OBTAINING ENDORSEMENTS.

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WHAT IS AN ENDORSEMENT?

“[A]n endorsement is an amendment to or modification of an existing policy of insurance. It is not a separate contract of insurance. Standing alone, an endorsement means nothing.”

Adams v. Explorer Ins. Co. (2003) 107 Cal.App.4th 438, 451.

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1. Right of Access . . . by ground, sea *or* air?
 - You may want an Access Endorsement.
2. Nice house . . . *or* is it a vacant lot?
 - You may want a Location and Map Endorsement.
3. Valid loan . . . *or* is it usurious?
 - You may want a Usury Endorsement.

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TRAP NUMBER 1

THE PRELIMINARY TITLE REPORT

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THE INITIAL TITLE PRODUCT: THE PRELIMINARY REPORT – What It Is, What It Is Not, And What It Can Be

- 1. It is an offer to issue a title insurance policy subject to the terms and exclusions therein.**
- 2. It is not an abstract of title.**
- 3. It can be a basis for a fraud claim.**

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WHAT THE PRELIMINARY REPORT **CONCEALS** FROM YOU

1. There is a reason why there is **no written application** for a Loan or Owner's Policy of Title Insurance.
2. Vague and ambiguous exclusions in the policy which are **designed to provide** the insurer with **bogus grounds to deny valid claims.**
3. Accepting the offer in the preliminary report does **not** really get you an indisputably valid Loan or Owner's Policy of Title Insurance.

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ISSUE NUMBER 1

DISCLOSURE OBLIGATIONS

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California Insurance Code § 332:

§ 332. Required disclosure

Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

California Insurance Code § 330:

§ 330. "Concealment" defined

Neglect to communicate that which a party knows, and ought to communicate, is concealment.

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The Insurer's disclosure obligations may be of a quasi-fiduciary nature.

“. . . an insurer holds itself out as a fiduciary. With a public trust must go public responsibility consonant with the trust, including qualities of decency and humanity inherent in a responsibilities of a fiduciary.”

See, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 820 and Frommoethelydo v. Fire Ins. Exchange (1986) 42 Cal.3d 208, 215. See also, Village Northridge Homeowners Ass'n. v. State Farm Fire & Cas. Co. (2010) 50 Cal.4th 913, 929 (“[the insurer] is in a legally recognized special relationship with [the insured], and it has duties that clearly encompass forthright and affirmative disclosures . . .”)

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Save The Date!

**LOAN GUARANTEES:
*ENHANCING YOUR RECOVERY***

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Joffrey Long

**12:00 Noon PST
October 20, 2016
Webinar
Buchalter Nemer
1000 Wilshire Boulevard, Suite 1500
Los Angeles, California 90017**

TRAP NUMBER 2

EXCLUSION 3(A) & EXCLUSION 3(B)

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EXCLUSIONS 3(a) and (b)

“The following matters are expressly excluded from coverage of this policy, and the Company will not pay loss or damage, costs, attorneys’ fees or expenses that arise by reason of: . . . 3. **Defects, liens, encumbrances, adverse claims, or other matters** (a) *created, suffered, assumed, or agreed* to by the Insured Claimant; (b) **not Known to the Company**, not recorded in the Public Records at Date of Policy, **but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became and insured under this policy.**”
(emphasis added)

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ISSUE NUMBER 2

DEFENSES TO EXCLUSIONS 3(A) & (B)

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Insurance Code § 333, “Required inquiry”:

Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

- 1. Those which the other knows.***
- 2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant.***
- 3. Those of which the other waives communication.***
- 4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.***
- 5. Those which relate to a risk excepted from insurance, and which are not otherwise material.***

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Insurance Code § 336, “Waiver”:

The right to information of material facts may be waived, either (a) by the terms of insurance or (b) by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

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ISSUE NUMBER 3

WHAT YOU “KNOW”

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YOUR LOAN UNDERWRITING (OR YOUR FILE) . . . CAN IT CAUSE YOU TO LOSE COVERAGE?

- 1. What did your appraiser, broker, CPA, notary or lawyer know, see or hear?**
- 2. What did the borrower's, buyer's or seller's credit report, building permit, leases, etc., show about the ownership of the property?**
- 3. What did you know?**

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ISSUE NUMBER 4

ESCROW INSTRUCTIONS

(the key to a valid and enforceable Deed of Trust or title interest)

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SELECTION OF THE ESCROW AGENT: TYPES OF ESCROW AGENTS

- 1. Title Insurer.**
- 2. Underwritten Title Company.**
- 3. “Independent” escrow.**
- 4. Banks.**
- 5. Attorneys.**
- 6. Mortgage Broker.**

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FUND DISBURSEMENT

1. **Should a broker or lender disburse the loan funds to anyone other than the escrow agent or title insurer?
How about a fund disbursement agent?**
 - **This is a significant business decision.**
2. **Who should disburse the loan funds?**
 - **Consider the escrow agent or title insurer.**
3. **Potential consequences of improper loan disbursement:**
 - A. Unenforceable Grant Deed.**
 - B. Unenforceable Promissory Note.**
 - C. Unenforceable Deed of Trust.**
 - D. Loss of title insurance coverage.**

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1. Using an underwritten title company or title insurer as the escrow agent.
 - A. Avoids claims by insurer that information disclosed to the escrow agent was not “known” by the insurer.*
 - B. Avoids claims by the insurer that something that occurred at escrow voids coverage.*
 - C. May make title insurer an escrow agent.*
2. Errors and omissions insurance.
3. Closing protection letter.
4. Loan Policy of Title Insurance (ALTA Form, Title Insurer’s Form and/or Lender’s Form).

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THE SUB-ESCROW

1. Historic background

- **Holding of money (did not trust the escrow company).**

2. Current developments

- **Attempting to avoid escrow liability by claiming that the word “sub” negates the term “escrow.”**

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ISSUES WHICH CAN ARISE INVOLVING ESCROW INSTRUCTIONS

1. “First lien” or a “thirty-first lien?”

According to one Judge, this does not work:

“Upon notification from Settlement Agent that it is ready for closing, Title Company is instructed to record the closing Documents ONLY when it is prepared and irrevocably committed to issue an ALTA Loan Policy of title insurance (the “Title Policy”), insuring Lender, in the sum of \$2,500,000.00, which sum is equal to one hundred twenty five per cent (125%) of the principal amount of the Loan, as a FIRST LIEN on the Property . . .”

2. Borrower, Trustor and/or Guarantor are not the person(s) they claim to be.
3. Separate escrows involving the same property.
4. Fund diversion.
5. Lack of capacity to execute loan documents.

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HOW ESCROW INSTRUCTIONS CAN EXPAND YOUR TITLE INSURANCE COVERAGE AND PROVIDE YOU WITH MORE PROTECTION

1. Require recordation as a “*first lien.*”

“When all of the conditions precedent to requesting the deposit of the Loan proceeds **you are authorized and instructed to record forthwith as a first priority lien on the Borrower’s Property**”

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HOW ESCROW INSTRUCTIONS CAN EXPAND YOUR TITLE INSURANCE COVERAGE AND PROVIDE YOU WITH MORE PROTECTION

2. Require title insurance which insures a “*first lien.*”

“As soon as you have recorded Lender’s enclosed Deed of Trust, you are instructed to deliver a Policy of Title Insurance . . . insuring that . . . the enclosed Deed of Trust is a first Priority Lien”

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HOW ESCROW INSTRUCTIONS CAN EXPAND YOUR TITLE INSURANCE COVERAGE AND PROVIDE YOU WITH MORE PROTECTION

- 3. Label your instructions as “escrow instructions to escrow agent and title insurer.”**
- 4. Beware of credit reports, appraisals and environmental studies.**

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HOW ESCROW INSTRUCTIONS CAN EXPAND YOUR TITLE INSURANCE COVERAGE AND PROVIDE YOU WITH MORE PROTECTION

5. Consider providing your entire purchase, sale or loan file – *including pertinent emails* - to escrow and title.

“During the course of underwriting this loan, Lender has received documents from the Borrower and other sources which may be inspected by you at Lender’s office during regular business hours. *Lender offers you the opportunity to review these documents*”

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HOW ESCROW INSTRUCTIONS CAN EXPAND YOUR TITLE INSURANCE COVERAGE AND PROVIDE YOU WITH MORE PROTECTION

6. Consider a comprehensive **title insurance and escrow** strategy so that they compliment each other and maximize your protection.

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INSTRUCTIONS TO THE ESCROW AGENT

1. An Escrow Agent is a fiduciary.

“An escrow [agent] bears a fiduciary relationship to each party.” *Markowitz v. Fidelity Nat.* (2006) 142 Cal.App.4th 508, 526.

2. An Escrow Agent must strictly comply with instructions.

“It is elemental that the duty of an escrow [agent] is to comply strictly with the instructions of its principal . . . If the escrow agent fails to follow his instructions or acts negligently, eh may be liable for any loss occasioned thereby.” *Diaz v. United Cal. Bank.* (1977) 71 Cal.App.3d 161, 166.

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INSTRUCTIONS TO THE ESCROW AGENT

3. The Lender's Escrow Instructions may be **express (oral or written) or implied** from the express instructions.

“An escrow holder has an implied obligation to do all of thing things normally done by an escrow agent . . .” *Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 807.

“Some escrow instructions may be implicit in the express instructions given.” *Claussen v. First American Title Guar. Co.* (1986) 186 Cal.App.3d 429, 436.

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INSTRUCTIONS TO THE ESCROW AGENT

4. Express Instructions.

A. Written Instructions.

1. Escrow Agent's Forms.
2. Broker/Lender Forms.

B. Oral Instructions.

“There is no requirement that an escrow agreement, as such, be in writing.” *Kelly v. Steinberg* (1957) 148 Cal.App.2d 211, 217; **“We cannot find a sound basis for concluding that the Financial Code sections were intended to abrogate the principles of contract and agency law which allow for binding oral agreements.”** *Zang v. Northwestern Title Co.* (1982) 135 Cal.App.3d 159, 167-168.

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INSTRUCTIONS TO THE ESCROW AGENT

5. Consistent “matching instructions.”

“Review all of the documents which you are aware of or have had the opportunity to review, to determine that they are all consistent with one another”

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INSTRUCTIONS TO THE ESCROW AGENT

6. Types of instructions.

A. Unilateral instructions (i.e. all parties sign different instructions).

B. Bilateral instructions (i.e., all parties sign the same escrow instructions).

“An escrow is typically the mutual exchange of instruments through a third party and delivery to each party is conditioned on deposit by the other party. (cit. omit). An escrow imposes concurrent conditions which are mutually dependent, requiring simultaneous performance.” *Claussen v. First American Title Guar. Co.* (1986) 186 Cal.App.3d 429, 437.

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INSTRUCTIONS TO THE ESCROW AGENT

7. Unique issues for loans where there is construction.

- A. Written disclosure to the escrow agent and the title insurer of the potential for the commencement of the work of improvement.
- B. Mechanic's liens.
- C. Fund disbursement.
- D. Stop notices.
- E. *BB Syndication Serv's v. First Amer. Title Ins.* (7th Cir. 2015) 780 F.3d 825

- ***Best Practices***

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John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Joffrey Long

**12:00 Noon PST
October 20, 2016
Webinar
Buchalter Nemer
1000 Wilshire Boulevard, Suite 1500
Los Angeles, California 90017**

TRAP NUMBER 3

NOTARY PUBLICS

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NOTARY PUBLICS

1. Title insurer's “***dirty little secret.***”
2. Should a broker or lender obtain any signatures or acknowledge loan documents themselves?
 - **This is a significant business decision.**

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NOTARY PUBLICS

3. Who should serve as the notary public?

- You should consider an employee of the escrow agent or insurer.

“Any documents must be acknowledged by a notary public who is currently employed by you.”

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NOTARY PUBLICS

4. Scope of the notaries duties:

- **Identification of the borrower/trustor.**

5. Why do you want the notary to be employed or approved by the escrow agent and/or insurer?

- Determination of the capacity of grantor/borrower/trustor to execute documents to convey or encumber property.
- **Explaining documents?**
- ***Citicorp Savings v. Stewart Title Guaranty Co. (1988)***
840 F.2d 526

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ISSUE NUMBER 5

ESCROW CLAIMS & TITLE INSURANCE CLAIMS

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CLAIMS AGAINST THE ESCROW AGENT

1. Do you have standing to make a claim?
2. Statute of limitations: 2, 3 or 4 years?
3. Why make an escrow claim?

Answer: An escrow claim is separate and distinct from a title claim and could be more advantageous. Don't just make a claim to your title insurer!

4. The measure of damages.
5. Tolling Agreements (when the title insurer accepts your claim).

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1. **Tender your claim early.**
2. **California Fair Claims Settlement Practices Regulations.**
3. **Advocate your claim: do not accept “no” as answer.**
4. **Beware of “post-claims underwriting.”**
5. **Is your claim accepted with a reservation of rights?
If so, what rights are reserved?**
6. **The need for coverage counsel.**
7. **Litigation claims.**
 - **Are you entitled to independent counsel?**
 - **Is the insurer pulling an *Anastasi v. Fidelity Nat'l Title Ins. Co.* (2016) 137 Haw. 104?**
8. **Non-litigation claims.**

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CONCLUSION



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