



SCOTT A. WHITE
COMMISSIONER OF INSURANCE
STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

P.O. BOX 1157
RICHMOND, VIRGINIA 23218
1300 E. MAIN STREET
RICHMOND, VIRGINIA 23219
TELEPHONE: (804) 371-9741
www.scc.virginia.gov/boi

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Administrative Letter 2022-01

To: All Title Licensed and Registered Settlement Agents

Re: "Split Settlements"

The Bureau of Insurance ("Bureau") has become aware of a practice referred to in the title insurance/title settlement industry known as a "split settlement" where escrow, settlement and closing services subject to the Real Estate Settlements Act, § 55.1-900 *et seq.* of the Code of Virginia ("Code") ("RES") and Real Estate Settlement Agents Act ("RESA"), § 55.1-1000 *et seq.* of the Code are bifurcated between more than one settlement agent. This letter is to notify the Bureau's title licensed and registered settlement agents of the Bureau's position that the applicable laws and regulations do not authorize this split settlement practice, as discussed in more detail below.

I. Virginia Real Estate Settlements

A real estate settlement consummates the sale, transfer, refinancing or other similar transaction related to real property. For Virginia real estate transactions subject to RESA, an individual or entity identified by § 55.1-1003 of the Code is authorized to perform the escrow, closing or settlement services identified by § 55.1-1000 of the Code and is required to perfect and record the applicable transaction. The definition of "Escrow, closing, or settlement services" in § 55.1-1000 includes the administrative and clerical services required to carry out the terms of contracts affecting real estate. Section 55.1-1008 of the Code dictates that the settlement agent handle funds in a fiduciary capacity.

During a purported "split settlement", the escrow, closing, or settlement tasks for which the settlement agent is responsible, are shared/divided between two or more individuals or entities. Though a split settlement arrangement arises out of a variety of factual scenarios, often a purported split settlement occurs when the purchaser and the seller to a real estate transaction select separate settlement agents, and those agents divide the escrow, closing or settlement services respective to the purchaser's and seller's responsibilities to the transaction. For example, the settlement agent selected by the buyer will receive and issue receipts for funds, research the title, secure title insurance, obtain the buyer's signature(s), verify documents and disburse funds, and the settlement agent selected by the seller will prepare the deed, obtain mortgage payoff figures, secure the seller's signature(s) and provide such information to the

buyer's settlement agent. A purported split settlement also occurs when the seller is represented by an attorney and a separate written agreement between the buyer's settlement agent and the seller's attorney requires the buyer's settlement agent to disburse funds such as mortgage payoffs and other proceeds or obligations to the seller's attorney for distribution to the required individuals or entities identified on the settlement documents. However, as addressed below, the applicable statutes and regulations do not authorize split settlements.

II. Discussion of Applicable Statutory and Regulatory Provisions

Section 55.1-1003 (A) of RESA identifies six persons who may act as a settlement agent: 1) a licensed attorney; 2) a licensed title insurance company under Title 38.2 of the Code; 3) a licensed title insurance agent appointed by a title insurance company; 4) a licensed real estate broker; 5) a financial institution authorized to do business in Virginia under any of the provisions of Title 6.2 of the Code or under federal law; or 6) a subsidiary or affiliate of a financial institution described in section 5 above. Of these, the Bureau regulates the title insurance companies and title insurance agents, identified by § 55.1-1003(A)(2) and (3) of the Code.¹ Settlement agents and agencies, including title settlement agents and agencies regulated by the Bureau, are required to comply with § 55.1-1000 *et seq.* of the Code, as well as applicable provisions of Title 38.2 of the Code.

Section 55.1-1008 of the Code provides that "[a]ll funds deposited with the settlement agent in connection with escrow, settlement, or closing shall be handled in a fiduciary capacity" and managed under the provisions of the escrow, settlement, or closing agreement. While the Code does not prohibit the settlement agent from retaining or engaging other individuals or entities to assist with performing certain administrative components of the settlement transaction, it is ultimately the settlement agent, as identified by the buyer, who must perform all of the settlement services prescribed by the Code. The designated settlement agent is responsible for overseeing these tasks, ensuring the accuracy of the information obtained through these tasks, and ultimately appropriately directing the closing and settlement. It is the Bureau's position, therefore, that the title settlement agent's fiduciary responsibility cannot be transferred, delegated or substituted, and that there can only be one settlement agent involved in the settlement or closing.

Though, as identified above, different types of individuals or entities are authorized to act as a settlement agent, statutory language contained in numerous sections of RESA and the related Real Estate Settlements Act, § 55.1-903 *et seq.* of the Code ("RES") contemplate only one designated settlement agent performing the required activities and tasks for any particular real estate transaction. Sections 55.1-900, 55.1-902, 55.1-903, 55.1-1000, 55.1-1006, 55.1-1007, 55.1-1008, and 55.1-1011 of the Code all refer to "the (emphasis added) settlement agent." If multiple settlement agents were anticipated or authorized under the Code, there would be no need for the Code to designate the buyer as having the exclusive right to choose the settlement agent for the transaction and to specify that this right cannot be varied or waived. Additionally, § 55.1-907 of the Code clearly does not support the notion of bifurcation of settlement services. For a person attempting to seek penalties for the settlement agent's failure to cause disbursement under § 55.1-907 of the Code, a split settlement could create an unduly burdensome and complicated situation whereby each settlement agent could attempt to abdicate responsibility for causing the failed disbursement.

¹ Other entities, namely the Virginia State Bar and the Virginia Real Estate Board, respectively regulate Virginia licensed attorneys and Virginia real estate brokers acting as settlement agents.

As such, the applicable statutes and regulatory provisions do not authorize split settlements. The plain language of the Code recognizes that a single – not two or more – settlement agent be responsible for and oversee the settlement services required for a lawful settlement. This means that the settlement agent, designated by the buyer and identified on the closing statement per §55.1-1000 of the Code, is responsible for all escrow, closing, or settlement services associated with the transaction, and for compliance with the Code and the Commission's Rules Governing Settlement Agents, 14 VAC 5-395-10 *et seq.*

Conclusion

Accordingly, the Bureau's position is that Virginia's applicable laws and regulations provide for a single settlement agent, identified by the buyer, who is responsible for all of the escrow, closing or settlement services prescribed by the Code. As such, the Bureau views participation in split settlement arrangements by title settlement agents as a violation of applicable Virginia laws and regulations.

Questions and/or requests for clarification should be directed to:

**Bureau of Insurance
Real Estate Settlement Agent Investigations Section
resa@scc.virginia.gov
804-371-9619**

Sincerely,

A handwritten signature in black ink, appearing to read "Scott A. White". The signature is fluid and cursive, with a large loop at the end.

Scott A. White
Commissioner of Insurance