

PENN ATTORNEYS TITLE ALERT

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RE: Title Alert 2009-02

Good Funds Reminder

NOTE: This Title Alert is intended for use by Approved Attorneys of Penn Attorneys Title Insurance Co. and any reliance by any other person or entity is unauthorized. This alert is intended solely for the purpose of underwriting policies of Penn Attorneys Title Insurance Co.

Hardly a day goes by where we don't hear about or get a call that a lender is not funding their mortgage.

While quite possibly the delay is normal, these are frightening economic times. This kind of circumstance provides the impetus to periodically remind our Approved Attorneys of the dangers of disbursing ANY funds before you are able to confirm with your bank that any amounts received from lenders or others have been finally cleared by your bank into the trust account and are not subject to reversal.

Attached is a copy of a special bulletin from First American Home Office Underwriting Group entitled "Settlement Practices and Good Funds" which is a good reminder of some of the unique risks faced by our settlement agents in this tough economy. For more information, please refer to our prior good funds alerts on our website by going to:

http://www.pennattorneys.com/printable/title_alerts/2008-07.pdf

http://www.pennattorneys.com/printable/title_alerts/2007-15.pdf

If you have any questions, please contact us.

Title Alerts from 1997 to present are available on our website at: <http://www.pennattorneys.com>

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CORPORATE UNDERWRITING

Home Office National Bulletins

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Recently the real estate industry has experienced an epidemic of lenders who are unable to fund loans. We have seen dozens of instances in which settlement agents have disbursed funds in reliance upon a lender's check or wire, only to have that check or wire dishonored. The shortage created in the settlement agent's escrow account creates escrow liability for the settlement agent.

The time has come to re-evaluate practices relative to accepting checks and wires from lenders. With reports that some large, national lenders are experiencing difficulty in finding adequate sources of funds for their mortgage origination business, First American believes it is important for settlement agents to re-evaluate the practice of disbursing funds prior to said funds being "finally credited" to the escrow account. First American's concern with this practice includes reliance upon a check or wire from any lender, regardless of the size and apparent financial strength of the lender.

Checks

Many states have "good funds" laws which must be complied with. Additionally, Part 229 of Title 12 of the Code of Federal Regulations provides guidance regarding when banks must make funds received for deposit available for withdrawal. Notwithstanding these provisions, the only truly safe check is one that has been fully and finally credited to the settlement agent's bank account. While a check may comply with the "good funds" law and may be available for withdrawal, it still may not clear, and often days pass before the settlement agent's bank is able to notify the settlement agent of a dishonored check. The delay in notification often leaves the settlement agent with an account shortage well past the point in time when the settlement agent's disbursements can be reversed.

Therefore, as a best practice, all settlement agents are encouraged not to disburse funds until confirmation has been received that those funds have been fully and finally credited to the settlement agent's account. If such confirmation has not been received then settlement agents should, at a minimum, require one of the following types of checks (which are much harder to obtain without funds on hand or to reverse):

- Cashiers Check
- Certified Check
- Teller's Check

As a settlement agent making a decision as to whether to disburse before funds are fully and finally credited to the account, you need to make the decision with the understanding that you are underwriting the loss if the check is later dishonored.

Wire Transfers

Many settlement agents believe that it is always safe to disburse against funds that are wire transferred to the escrow account. Caution must be exercised to ensure that wired funds are actually credited to the settlement agent's account prior to disbursing. Please note that receipt of the Fed Reference number does not ensure the funds have been received and finally credited to the account. This number merely confirms to the settlement agent that the sender has completed the wire transmission. If the wire transmission is received after the receiving bank's incoming wire cut-off time, the receiving bank will credit the account the next business morning. Also, if the registration on the wire does not match the account registration or if the account number is invalid, the receiving bank will reject the wire. An intervening solvency issue with the funding bank could lead to the dishonor of the wire transfer. Therefore, settlement agents must confirm that wired funds have been finally credited to the account prior to disbursing.

ACH Transfers

Settlement agents must also take special precautions if the funding is by an ACH credit. An ACH (Automatic Clearing House) credit is not the same as a wire transfer. ACH Credits may be reversed. Following receipt of an ACH credit, the settlement agent should not disburse until the funds are verified and have finally cleared in the escrow account. First American encourages settlement agents to discuss the procedures regarding the reversal of ACH credits with their escrow account depository bank. It is also recommended that an account be set up for the sole purpose of receiving ACH transfers which can then be automatically transferred to a second trust account to insulate against recalls. The escrow account relationship with the bank can be set up to provide a mechanism for notice and consent prior to reversal.

First American understands the impact of the changes to the business practices of settlement agents suggested in this Bulletin. This Bulletin is not a legal opinion, and settlement agents are encouraged to seek advice from their own counsel. First American believes it is important for settlement agents to be aware of their potential exposure in the current market environment so they can make informed decisions as to business practices.