



Escrow Agreements at Closing

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There are times at closing when certain issues require resolution post closing. Some of these issues include but are not limited to open judgments, unpaid real estate taxes, unrecorded real estate tax payments, restoration of real estate taxes, and open mortgages of record which have supposedly been paid off however proof is unavailable by the time of closing. At the closing table the title closer will contact our office in the attempt to resolve these issues so that we may issue a title policy free and clear of the exception.

It should be emphasized that only certain issues lend themselves to be disposed of at closing via Escrow Agreements. Issues that cannot be easily quantified as to monetary amount (e.g., a devolution of title question, doubts about the validity of a particular deed) clearly are difficult to clear up simply by holding a particular sum of money in escrow. Other obstacles such as open Mechanic's Liens and Federal Tax Liens appear at first glance to be quantifiable as to potential risk but the truth is that the title industry is loath to accept escrow deposits to omit them. In the case of Mechanic's Liens and Federal Tax Liens there is simply no way for a title agent/company to be certain it has adequately protected the priority of its insured documents.

Often at closing we will be called upon to omit an open judgment that affects the seller of the property. We are asked to pay off the judgment on behalf of the seller. To effectuate this, we hold an "escrow" in an amount equal to pay off the judgment. The title closer will collect the money at closing and prepare an "Escrow Agreement" for the depositor, in this case the seller, to sign.

Escrow, by definition, is:

"A contract, deed, bond, or other written agreement deposited with a third person, by whom it is to be delivered to the grantee or promisee on the fulfillment of some condition."

Each underwriter provides its form of Escrow Agreement. Though varying somewhat in form, they are all basically the same in terms of content. It is an obligation of the title agent to use the particular underwriter's form of agreement when the policy is being insured through that underwriter. The back of the agreement contains terms and conditions under which the escrow is subject. Note that in the past generic forms of Escrow Agreements were used by some agents, and in a few cases, not honored by the underwriter when a potential claim evolved concerning the escrow, solely due to the fact that the agreement was not issued on the proper underwriter's form.

There are two types of escrow. One type is an "escrow to pay". In this instance the money is deposited with our company at closing on the condition that the escrow will be immediately paid to the creditor. The other type of escrow is an "escrow to hold". With this form of escrow, the money is deposited with our company and then held pending further information. Additional information might include updated creditor's payoff letters, the issuance of some form of proof of a prepaid lien, closing documents still to be delivered, or actual restoration of real estate taxes by the city or county to its full value subsequent to the demise of an owner, etc. Both of these escrows state an amount of time in which the escrow issue must be resolved. Pursuant to the terms of the Escrow Agreement, should the depositor not comply with the terms and conditions of the agreement by the specified date, the depository can cause taxes and liens, for example, to be paid out of the deposit in the amount required to effectuate compliance, notwithstanding the case of an "escrow to hold". Aside from any of the provisions under the agreement, the

depository is authorized without notice to the depositor, to pay, satisfy or otherwise dispose of items that are considered potential threats to protect title to the property or marketability thereof. Balances will be refunded to the depositor, less any actual additional charges or expenses.

Escrows in general are non-interest bearing deposits, however should a depositor want interest for the escrow money deposited, especially when a substantial escrow deposit is being held, we are able to set up a special account specifically for that escrow deposit which will bear interest. There is a nominal administrative fee for initiating and maintaining the account.

Escrow deposits that are being held will be refunded upon receipt by the depository (title agent) of satisfactory proof of performance of the covenants and conditions thereof.

One very important law to remember governing escrow deposits is Section 1317 of the Abandoned Property Law (unclaimed security deposits held by the title insurance companies) in which under certain conditions, within three years from the acceptance of the "Deposit" the title agent must turn over the deposit to the underwriter who then turns it over to the State of New York as "abandoned property" unless written correspondence has been received by us from the depositor.

In the event that there is an open lien or judgment for which we are holding an escrow, and the depositor has another title insurance transaction such as a refinance wherein the open issue surfaces again, we are able to issue a "Benefit Letter" to the new title agent/company simply stating that we will hold our escrow deposit for the benefit of their transaction as well as ours. Once the issue is paid and resolved, we will forward proof to the new insurer so that it can close out its file.

The following checklist should prove useful to the title insurance consumer with regards to escrows at closing:

- Make sure that your Escrow Agreement is issued with the correct underwriter's form.*
- With a long term escrow (6 months or more) follow up in writing so as not to jeopardize your escrow deposit in the future as "abandoned property".*
- Request interest bearing accounts for sizeable escrows for which the interest accrued will exceed the cost of setting up the initial account.*