Good funds and CFPB: Has the rubber finally met the road?

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Statement of Current Practice:

The current customary practice with respect to 1-4 family residential real estate in Connecticut is that the attorney settlement agent (ASA), after receiving a clear to close notification from the mortgage broker or bank (bank) schedules a closing with the borrower, mortgage broker or bank (bank) and the seller's attorney (seller). On the date of closing, a package of closing documents is transmitted electronically to the ASA, who serves in the dual role of bank's representative and buyer's representative. This package includes additional instructions which must be complied with (instructions to settlement agent) including any conditions that must be cleared prior to disbursing funds. Typically, these conditions must be submitted to bank for approval prior to disbursing funds and, sometimes, the documents submitted are documents that must be signed by the borrower and seller at the closing table and faxed to bank. Bank then approves the loan and issues a funding number or a verbal authorization to disburse.

The closing proceeds used to come to the ASA in either the form of a certified or cashier's checks drawn on the Bank's operating account or "official" checks drawn on automated clearing houses, or ACH funds. As we know, these "official" checks, while they look like cashier's or treasurer's checks, may not represent immediately available funds. More often, nowadays, the closing proceeds are transmitted by wire transfer to the account of the ASA. The problem arises, both with "official" checks and with wired funds, if the funds are not available to be disbursed at the date and time of closing because they, either, have not been received by the ASA in his or her clients' fund account or are not immediately available funds. The ASA is faced with the dilemma of either, not releasing checks until the funds are received, or releasing the closing checks into escrow pending notification that the wire is received or the "official" check has been honored. With the meltdown of financial institutions in 2008, it was not uncommon for an ASA to be caught in the dilemma where checks written or released were dishonored because their underlying financial institutions had become insolvent. That problem is largely over but, with the new oversight of banks and their settlement agents that will be administered by the Consumer Financial Protection Bureau (CFPB), all parties have an interest in a smooth, trouble-free closing process.

There is incredible pressure to close in the marketplace. Customers often have back-to-back closings of sales and purchases, or require certified or wired funds for subsequent transactions or have all their worldly belongings loaded on a truck waiting to complete their transaction. Any delay past the completion of the closing brings frustration, confusion or acrimony into the equation. As a result, the unofficial custom has arisen wherein the ASA will release checks to other attorneys in written or oral escrow, pending notification of receipt of the wired funds. Equally often, the seller's attorney will deliver the checks to the realtors or the seller with a written or oral admonition that they should not negotiate these checks until they hear from the Attorney. This accommodation is made,

despite being a probable violation of Rule 1.15 of the Rules of Professional Conduct, to afford an accommodation to the other parties to the transaction and in a good faith belief that the delivery of the funds is a reasonable conclusion.

This practice, however well intentioned, probably violates our Rules of Professional Conduct, may permit a defense to a malpractice insurer that otherwise would not exist, and may violate agency agreements that the ASA has with its title insurance companies. Additionally, the CFPB has alerted the lender community that it will look to them to monitor the practices of its third party vendors and, accordingly, an ASA attempting to accommodate a customer of the Bank may inadvertently cause the Bank problems with the CFPB.

National Scope of the Problem and the CFPB:

It is important to note that this is not a Connecticut problem. It is a national problem, involving lawyers and title agents across the country, and local, State and Federal Banks. The requirement, on and after August 1, 2015, of providing a closing disclosure at least 3 business days before closing would, at first blush, seem to offer a solution. We will know, at least 3 days in advance of closing, what the final numbers should be and, accordingly, the lender should be able to wire that amount of money at the date and time of closing. In practice, however, the possibility of fines and penalties imposed by the CFPB for rules violations may very well exacerbate the problem. Also, the possibility of lender's funds having to be sent back due to a failed closing and redisclosure may make funding even more problematic.

The problem of timely funding will have to be addressed by either regulation or law. Several states already have "wet closing" requirements. Connecticut has a bill pending at the legislature to require funding at the date and time of closing. The likelihood, as things stand now, that a loan will not be timely funded and trigger redisclosure requirements is an issue that needs to be addressed because where a closing has to be rescheduled, it will have a disruptive effect to the commerce of closings.

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