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ESCROW INSTRUCTIONS:
HIDDEN DANGERS
TO YOUR SECURITY COLLATERAL

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ISSUES WHICH CAN ARISE INVOLVING ESCROW INSTRUCTIONS *WHICH YOU ASSUME TO BE CORRECT . . .*

1. “First lien” or a “thirty-first lien”?
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.
6. Description of the property to be encumbered.
7. Conditions to title to the property to be encumbered.



SELECTION OF THE ESCROW AGENT: TYPES OF ESCROW AGENTS *WHICH YOU ASSUME THE LENDER HAS ARRANGED FOR*

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



THE PROPERTY INSPECTION: PART 1

Exterior Inspection:

a. What did you see?

For sale signs, physical improvements, construction?

b. What did you hear?

No seeking a loan? I don't really own it?

Interior Inspection:

a. What did you see?

b. What did you hear?



THE PROPERTY INSPECTION: PART 2

What did you disclose:

- a. To the lender?
- b. To the escrow agent?
- c. To the title insurer?

Are you the agent for the lender?

Is your knowledge imputed to the lender?

Will your imputed knowledge cause the lender to lose its presume security?



MEASURES TO REDUCE THE RISK OF LOSS (WHICH YOU PRESUME THE LENDER HAS ADDRESSED)

- 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 (ALTA Form, Title Insurer's Form and/or Lender's Form)**
- 4. Loan Policy of Title Insurance**



HOW ESCROW INSTRUCTIONS CAN EXPAND THE LENDER'S TITLE INSURANCE COVERAGE AND PROVIDE THE LENDER WITH MORE PROTECTION (*WHICH YOU PRESUME THE LENDER HAS TAKEN CARE OF?*)

1. Require a “first lien.”

Sample instructions, Page 12, Paragraph 9

When all of the conditions precedent to requesting the deposit of the Loan proceeds, as set forth in Paragraph 7, have been performed or fulfilled and the Loan proceeds have been deposited with you pursuant to your request, **you are authorized and instructed to record forthwith as a first priority lien on the Borrower's Property described in the Lender's enclosed Deed of Trust and to close the above-referenced escrow.**



HOW ESCROW INSTRUCTIONS CAN EXPAND THE LENDER'S TITLE INSURANCE COVERAGE AND PROVIDE THE LENDER WITH MORE PROTECTION (*WHICH YOU PRESUME THE LENDER HAS TAKEN CARE OF?*)

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

Sample instructions, Page 13, Paragraph 10

10. As soon as you have recorded Lender's enclosed Deed of Trust, **you are instructed to** _____ [issue or cause _____ (name of title insurer) to issue] **and to deliver to Lender an extended coverage form American Land Title Association Loan Policy of Title Insurance (10/17/70) with** _____ [identify required endorsements, e.g., CLTA form endorsement 100] in the amount of \$_____, **insuring that title to the Property is vested in Borrower and that the enclosed Deed of Trust is a first Priority Lien** against the Subject Real Property that is subject and subordinate only to _____.



HOW ESCROW INSTRUCTIONS CAN EXPAND THE LENDER'S TITLE INSURANCE COVERAGE AND PROVIDE THE LENDER WITH MORE PROTECTION (*WHICH YOU PRESUME THE LENDER HAS TAKEN CARE OF?*)

- 3. Label your instructions as “escrow instructions to escrow agent and title insurer.”**
- 4. Beware of credit reports.**
- 5. Consider providing you entire loan file to escrow and title.**

See next slide for sample instruction designed to strengthen your claim or to defeat Exclusions 3(a) and (b)



HOW ESCROW INSTRUCTIONS CAN EXPAND THE LENDER'S TITLE INSURANCE COVERAGE AND PROVIDE THE LENDER WITH MORE PROTECTION (*WHICH YOU PRESUME THE LENDER HAS TAKEN CARE OF?*)

Sample Instructions, pages 4-5, Paragraph 2(r)

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 so that you have the ability to review and consider all documents received by Lender, which you may deem material to your decision to close the Loan or issue the requested loan policy of title insurance. In the alternative, upon your written request, Lender shall send to you copies of these documents. If you do not inspect these documents or request copies of these documents, Lender shall consider that you have waived your right to require disclosure of these documents to you by Lender prior to your closing of the Loan or issuing the policy of title insurance.



HOW ESCROW INSTRUCTIONS CAN EXPAND THE LENDER'S TITLE INSURANCE COVERAGE AND PROVIDE THE LENDER WITH MORE PROTECTION

6. Consistent “matching instructions.”

Sample instructions, Page 3, Paragraph 2(I)

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 **and shall result in Lender's Deed of Trust being recorded as a first priority lien on the Borrower's Property described in the Deed of Trust.**



UNIQUE ISSUES FOR LOANS WHERE THERE IS CONSTRUCTION (WHETHER OR NOT THE LENDER THOUGHT IT WAS A CONSTRUCTION LOAN)

- A. What did you see? Did you see work? Did you see materials?
- B. Did you provide a written disclosure to the lender of the potential for construction?
- C. Did the lender provide a written disclosure to the escrow agent and the title insurer of the potential for construction.
- D. Mechanic's liens.
- E. Stop notices.
- F. Fund disbursement.



NOTARY PUBLICS (HAS THE LENDER TAKEN THE NECESSARY STEPS TO ENCUMBER THE PROPERTY YOU HAVE APPRAISED)

1. **Title insurer's "dirty little secret."**
2. **Should a broker acknowledge signatures or acknowledge any loan documents themselves?**

This is a significant business decision.

3. **Who should serve as the notary public?**

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

NOTARY PUBLICS

Sample Instructions, Page 5, Paragraph 3 (partial)

Borrower must execute all Loan instruments and documents that _____ [he, she or it] is required to execute by signing [his, her or its] name exactly as it appears or will appear on the Deed of Trust. Any documents, including but not limited to the Deed of Trust, **which must be acknowledged, must be acknowledged by a notary public who is currently employed by you.**

NOTARY PUBLICS

Scope of the notaries duties:

- A. Identification of the borrower/trustor.
- B. Determination of the capacity of borrower/trustor to execute documents and encumber property.



STEPS TO MINIMIZE YOUR LIABILITY AS AN APPRAISER

1. Who might assert a claim against you?
Lender. Broker. Title Insurer. Borrower.
2. Make sure lender knows the assumptions you have built in.
3. Who do you state can rely upon it?
Class of person/class of risk.
4. Disclosures to lender of things discovered during the inspection of the property.
5. Adequate insurance
 - a. Burning limits?
 - b. Multi-million dollar appraisals, but \$500,000.00 in aggregate in coverage.



CONCLUSION