



ROLAND W. BURRIS

ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD



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FILE NO. 91-005

ADMINISTRATIVE LAW:
Certification of Closing
Service as Independent Escrowee

Shinae Chun, Director
Department of Financial Institutions
State of Illinois Center
100 West Randolph, Suite 15-700
Chicago, Illinois 60601

Dear Ms. Chun:

I have your letter wherein you inquire whether a third party conducting a contemporaneous real estate closing is required to be certified as an independent escrowee pursuant to the provisions of the Title Insurance Act (Ill. Rev. Stat. 1989, ch. 73, par. 1401 et seq.) and, if so, whether there are any circumstances in which the certification requirement would be precluded. You also inquire whether the deposit requirements for independent escrowees are subject to modification by the

Department of Financial Institutions. For the reasons hereinafter stated, it is my opinion that a party performing the closing services in question must be certified as an independent escrowee and, further, that the Department is not authorized to modify the deposit requirements for independent escrowees.

For purposes of your inquiry, a contemporaneous real estate closing may be described as a procedure for finalizing the transfer of real property in which documents and funds, including Torrens transactions, are sent to the third party closing agent for review and final distribution. Any documents or funds not distributed are returned the same day to the lender, registered title insurance agent, certified title insurance company, attorney, or other appropriate party.

Subsection 17(a) of the Title Insurance Act (Ill. Rev. Stat. 1989, ch. 73, par. 1417(a)) (hereinafter referred to as "the Act") provides, in pertinent part:

"* * * (a) Every independent escrowee shall be subject to the same certification and deposit requirements to which title insurance companies are subject under Section 4 of this Act.

* * *

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The term, "independent escrowee" is defined, in subsection 3(9) of the Act (Ill. Rev. Stat. 1989, ch. 73, par. 1403(9)), as follows:

" * * *

(9) 'Independent Escrowee' means any firm, person, partnership, association, corporation or other legal entity, other than a title insurance company or a title insurance agent, which receives deposits, in trust, of funds or documents, or both, for the purpose of effecting the sale, transfer, encumbrance or lease of real property to be held by such escrowee until title to the real property that is the subject of the escrow is in a prescribed condition. Federal and State chartered banks, savings and loan associations, credit unions, mortgage bankers, banks or trust companies authorized to do business under the Illinois Corporate Fiduciary Act, licensees under the Consumer Installment Loan Act, real estate brokers licensed pursuant to the Real Estate License Act of 1983, as such Acts are now or hereafter amended, and licensed attorneys when engaged in the attorney-client relationship are exempt from the escrow provisions of this Act.

* * *

(Emphasis added.)

The cardinal rule of statutory construction is to ascertain and give effect to legislative intent as expressed therein. (Denton Enterprises, Inc. v. Illinois State Toll Highway Authority (1979), 77 Ill. App. 3d 495, 501.) Statutes may not be construed more broadly than their express language and the necessary implications thereof allow, and a court can neither restrict nor enlarge the plain meaning of an unambiguous statute. (Bovinet v. City of Mascoutah (1973), 55 Ill. 2d 129, 133.) In construing a statute, consideration may be given to the object or purpose to be attained or subserved by statute. Johnson v. Stryker Corp. (1979), 70 Ill. App. 3d 717, 721.

Under the statutory definition of "independent escrowee", it appears that a third party, who conducts a contemporaneous closing as herein described and who does not fall within one of the express exemptions, would be considered an independent escrowee. The fact that the third party retains possession of the documents or funds for only a brief period of time is irrelevant, as the definition is based strictly upon the act of receiving deposits, in trust, of funds or documents for the purpose of effecting the sale or transfer of property. Clearly, an entity which receives funds or documents in trust for the purpose of performing closing services falls within the ambit of the statutory definition. Furthermore, exemption of the closing services in question would subvert the purpose of certification, which is to protect the parties during all stages of a transaction with respect to those entities which have custody of funds or documents submitted in trust. It should also be noted that regardless of whether the independent escrowee is engaged in escrow, settlement or closing services, all of these transactions are subject to regulation pursuant to subsection 17(e) of the Act. (Ill. Rev. Stat. 1989, ch. 73, par. 1417(e).)

Accordingly, it is my opinion that a party rendering contemporaneous closing services, as described herein, is an independent escrowee unless statutorily exempted, and, as such, would be required to meet the requisite certification.

With respect to your second question, the controlling factor, as previously stated, is whether the party receives deposits, in trust, of funds or documents for the purpose of effecting a property transaction. If that requirement is met, certification is mandatory unless the party is statutorily exempted. I would also point out that even if the aforementioned closing services were conducted by an independent contractor retained by one of the entities specifically exempted under the statutory definition, the independent contractor would not acquire exempt status under principles of agency. See generally Lewis v. Mount Greenwood Bank (1980), 91 Ill. App. 3d 481; Gasbarra v. St. James Hospital (1979), 85 Ill. App. 3d 32.

In response to your final question, independent escrowees, as previously noted, are subject to the same certification and deposit requirements imposed upon title insurance companies. (Ill. Rev. Stat. 1989, ch. 73, par. 1417(a).) Subsections 4(a) and 4(b) of the Act (Ill. Rev. Stat. 1989, ch. 73, par. 1404(a), (b)) provide, in pertinent part:

"(a) Every title insurance company licensed or qualified to do business in this State shall, within 30 days after the effective date of this Act or within 30 days after incorporated or licensed to do business, whichever is later, deposit with the Department, for the benefit of the creditors of the company by reason of any policy issued by it, bonds of the United States, this State or any body politic of this State in amounts as specified in subsection (b). * * *

(b) Every title insurance company shall deposit bonds or securities in the sum of \$50,000

plus \$5,000 for each county, more than one, in which the real estate, upon which such policies are issued, is located, to maximum deposit of \$500,000. Every title insurance company guaranteeing or insuring titles to real estate in counties having 500,000 or more inhabitants shall deposit securities with the Department in the sum of \$500,000. * * *

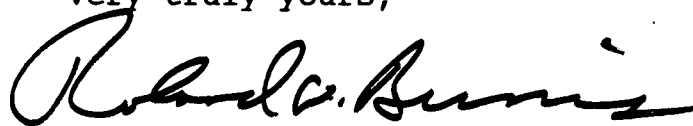
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It is well established that an administrative agency may exercise only such authority as is conferred by statute, or as is found by fair implication and intendment to be incident to powers which are expressly granted. (Troy v. State Board of Elections (1980), 84 Ill. App. 3d 740, 743; Illinois Dept. of Public Aid v. Brazziel (1978), 61 Ill. App. 3d 168, 172.) Based upon the plain language of subsections 4(a) and 4(b), it is clear that no discretionary authority has been granted to the Department of Financial Institutions regarding the amount to be deposited or the time period in which such deposits must be made. Independent escrowees are required to submit the bonds or securities in the amount and within the time limit specified by subsections 4(a) and 4(b) of the Act.

Accordingly, it is my opinion that the deposit requirements for independent escrowees are not subject to modification by the Department of Financial Institutions.

Very truly yours,



A T T O R N E Y G E N E R A L