

Common Problems

Over the years, the Bureau of Insurance has received and reviewed thousands of escrow account analyses and conducted thousands of investigations related to settlements involving Virginia property. As a result a number of common problems and violations continually surface. Each area is identified below by a specific section of the Virginia Code. Agents are encouraged to familiarize themselves with all provisions of Title 55.1 Chapter(s) 9 and 10 of the Code of Virginia and 14 VAC 5-395-10 et. seq. of the Virginia Administrative Code as well as Virginia insurance laws pertaining to insurance agents (Title 38.2 of the Code of Virginia).

By identifying these problems we hope to provide guidance to the real estate settlement agent industry and help agents avoid them.

Section 55.1-1004 of the Code of Virginia

Agencies frequently have their escrow account analysis performed late year after year. The code requires an analysis be performed every twelve months beginning a year after your initial registration. The analysis is to be performed during the month in which you registered. The analysis may be performed by either an independent CPA or an appointed underwriter. If completed by a CPA it is the agency's responsibility to submit the analysis within 60 days of completion and if performed by an underwriter it is their responsibility to submit it within 60 days. The responsibility to have the analysis performed falls to the agency not the underwriter. Therefore, failing to have the analysis performed timely results in action being taken against the agency.

Please note that if your analysis is due to be performed during the month of May and you choose to have the audit performed in April your analysis month changes to April. On the other hand if your analysis is performed in June your analysis month remains May.

Often times the auditor notes the agency performs settlements in more than one state, but the corresponding Schedule A (list of accounts) only lists the Virginia escrow account information. All account numbers for all accounts must be listed on Schedule A. We also see address changes on the analysis. It is the agency's responsibility to ensure the correct address is reflected in the Bureau's records. Change of address can be done through the Bureau's website.

Section 55.1-1008 of the Code of Virginia

This section is where the Bureau of Insurance identifies the greatest number of violations by settlement agents. This section contains several important provisions. Following are a number of problems identified:

1. This section requires agents to deposit and maintain Virginia settlement funds in a separate fiduciary account. This means Virginia settlement funds cannot be commingled with settlement funds from other states or with other non-settlement funds. Examples of commingling are as follows:
 - a.) Depositing or wiring settlement proceeds into an account other than an established Virginia escrow account.
 - b.) Depositing recording fees into the agency operating account.
 - c.) Depositing title premium into the agency operating account.
 - d.) While inadvertent lender wires are considered to be commingling, if corrective transfers are made within two days of receipt the agency would not be cited for violating this statute.
 - e.) Depositing recording fees associated with a Virginia transaction into a recording account containing fees from other states.
2. This section prohibits settlement agents from retaining interest received on funds deposited in connection with any escrow, settlement, or closing. The Bureau still finds instances where settlement agents retain interest on their settlement accounts in violation of this section.
3. This section also states that “funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed and, if applicable, in accordance with § 55.1-903. A settlement statement which has been signed by the seller and the purchaser or borrower shall be deemed sufficient to satisfy the requirement of this subsection.” The violations the Bureau has seen relating to this provision include agents disbursing funds to parties not listed on the settlement statement (HUD-1 and any addendums should mirror the disbursement sheet).

Implementation of the new RESPA rule has raised questions regarding how and where payees are to be listed on the HUD-1 settlement statement. We first look to HUD for guidance and find they state all Title Service fees must be included in the charges shown on Line 1101 and are not to be itemized.

Title Services are considered any service involved in the provision of title insurance, including but not limited to:

- * title examination and evaluation
- * preparation and issuance of commitment
- * clearance of underwriting objections
- * preparation and issuance of policies
- * all processing and administrative services required to perform these functions (e.g. document delivery, preparation and copying, wiring, endorsements, and notary); and
- * the service of conducting a settlement.

To comply with Virginia Code requirements all Title Service fees charged must be included on Line 1101 including Lender's title insurance and any fees paid to a third party should be itemized on blank lines in the 1100 series on the HUD-1 with the charge listed outside the borrower's column. In lieu of itemization on lines in the 1100 series the settlement agent may attach an addendum to the HUD-1 with an itemization of fees paid.

4. The code prohibits disbursing funds prior to the recordation of the deed (unless consented to by all parties), and requires the disbursement of funds within two business days of settlement to comply with § 55.1-903 of the Code of Virginia. It has been the Bureau's longstanding position that when certificates of satisfaction are received from a lender, the agent has two business days to disburse funds held to record the release. In short, always apply the 2 day rule to ensure compliance.
5. § 55.1-1008 also prohibits inflating or padding charges and failing to refund overcharges. In cases where overcharges have been discovered, it is the Bureau's practice to see that these funds are returned to the appropriate party. Overcharges have commonly been seen on document recording fees, release fees, and inspection fees. Additionally this type of activity would be considered falsifying a settlement statement in violation of § 55.1-1009 and has serious consequences.
6. In numerous cases, the Bureau has identified instances where the \$41.00 release recording fee is charged by both the lender and the settlement agent... in essence, a duplicate charge for the same service. The statutory provisions are clear in that if you charge \$41.00 for a governmental recording fee, then the fee should either be paid to the locality for the recording or returned to the consumer. The Bureau's main concern is to ensure fees collected are accounted for, maintained in a fiduciary capacity, not commingled, and disbursed to the appropriate entity as required.

7. Additionally, we have noted with some frequency agencies fail to verify funds have been received or deposited prior to disbursement which can cause NSF and overdraft issues. We have also seen cases where agents fail to maintain adequate funds in their escrow account to cover account service fees charged by the bank (this is allowed by the code). We have also found instances where agents use positive file balances to offset negative file balances. This would be considered a violation. Positive file balances which are not supported by written escrow agreements must be disbursed within two days. Negative file balances must be funded within two days – not at the end of the month when a reconciliation is performed. As part of the reconciliation process all agencies should have a process in place to clear outstanding checks on a regular schedule. An agency should never have an outstanding check in excess of 90 days.

8. Agents are allowed to handle title insurance premiums in one of three ways. § 55.1-1008 states in part:

Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed. Funds payable to persons other than the settlement agent shall be disbursed in accordance with § 55.1-903, except...

Title insurance premiums payable to title insurers and agents may be;
(i) held in the settlement agent's settlement escrow account, identified and itemized by file name or file number, as a file with a balance;

(ii) disbursed in the form of a check drawn upon the settlement escrow account payable to the title insurer or agent but maintained within the settlement file of the settlement agent; or

(iii) transferred within two business days into a separate title insurance premium escrow account, which account shall be identified as such and be separate from the business or personal funds of the settlement agent. These transferred title insurance premium funds shall be itemized and identified within the separate title insurance premium escrow account. All title insurance premiums payable to title insurers by title insurance agents serving as settlement agents shall be paid in the ordinary course of business as required by subsection A of § 38.2-1813."

Agents must apply one of the above options as a general business practice.

Section 55.1-1009 of the Code of Virginia

"No settlement agent shall intentionally make any materially false or misleading statement or entry on a settlement statement. An estimate of charges made in

good faith by a settlement agent, and indicated as such on the settlement statement, shall not be deemed to be a violation of this section.”

This means that all settlement statements should reflect actual charges for services rendered. Supporting invoices or documentation should be part of the settlement file. For example, if a settlement agent is billed \$100.00 for a termite inspection, the \$100.00 charge should be accurately reflected on the settlement statement. Any inflation of these type of charges would be a violation of this provision.

Section 55.1-1014 of the Code of Virginia

The Bureau of Insurance is identifying fewer registration violations, and it appears that agents are doing a better job of maintaining registration requirements and insurance. Please note that if you lose your title license for any reason you automatically lose your registration status and you must reapply for a license, obtain an appointment and re-register as a real estate settlement agent before conducting settlements. If you lose your license for failing to pay your annual assessment with the SCC’s Clerk’s Office, reinstatement with the Clerk’s Office **does not reinstate** your title license or registration.

Section 38.2-4616 of the Code of Virginia

Another problem the Bureau has identified involves the failure to provide the required notification to buyers of the availability of owner’s title insurance. This section states in part:

“In connection with any transaction involving the purchase or sale of an interest in residential real property in this Commonwealth, the settlement agent as defined in § 55.1-1000, before the disbursement of any funds, shall obtain from the purchaser a statement in writing that he has been notified by the settlement agent that the purchaser may wish to obtain owner’s title insurance coverage including affirmative mechanics’ lien coverage, if available, and of the general nature of such coverage, and that the purchaser does or does not desire such coverage. The notification shall include language that the value of subsequent improvements to the property may not be covered.”

All agents are required to obtain such a statement in writing from the purchaser prior to the disbursement of any funds.

Section 38.2-1813 of the Code of Virginia

This section deals with reporting of and accounting for premiums. This includes title insurance premiums collected by settlement agents for title insurance. It requires agents maintain premiums in a fiduciary capacity, account for such

premiums, and in the ordinary course of business pay the funds to the insurer entitled to the payment. The Bureau has seen numerous instances where settlement agents have collected title insurance premiums and failed to remit them in the ordinary course of business. With regards to handling title insurance premiums, the Bureau reviews the agent's contract with its title underwriter to determine the appropriate premium remittance time frame. Some agency contracts require premiums to be remitted on a monthly basis while other contracts may provide for 60 days, 90 days, or more for premium remittance. What the Bureau has seen, however, is an increasing number of agents who hold premiums for one or even two years before remitting them to a title insurer. Agents are encouraged to contact their title insurance underwriter and have them provide in writing the specific remittance time frames in which you are to remit your title insurance premiums. Title policies are also required to be issued within the same timeframe if not sooner.

Section 38.2-1820 of the Code of Virginia

This section requires a business entity acting as an insurance producer to designate a licensed producer responsible for the business entity's compliance with the insurance laws, rules and regulations and pay the applicable fees prior to obtaining a license. To this end the business entity must maintain a designated producer in order to maintain its license. The designated producer must be an employee of the agency and not a contract employee. This means an agency will be in violation of this statute if they select a designated producer that is not a bona fide employee of the entity. This also means if the entity fails to maintain a designated producer (employee) it is subject to having its license terminated.

Sections 38.2-1822 and 38.2-1833 of the Code of Virginia

These two code sections deal with the licensing and appointment of agents. The Bureau continually sees instances where unlicensed individuals solicit and discuss title insurance and have signed title insurance policies for licensed title insurance agencies. These sections of the Code of Virginia provide that no individual shall act as an agent on behalf of either a partnership, limited liability company, or corporation in the transaction of insurance unless that individual is licensed as an agent and appointed, if appointment is required by statute. We have also seen agents, who may be properly licensed, sign policies for title underwriters for which they do not hold an appointment. Agents are encouraged to verify that they are properly appointed with all title underwriters with whom they are currently doing business and instruct their unlicensed staff not to sign title insurance policies, binders or discuss title insurance.

Monthly Reconciliations

One additional problem noted by many underwriters performing audits as well as by Bureau staff involves settlement agents that do not reconcile their escrow account(s) in a timely manner. Numerous instances have been found where funds remain dormant in an escrow account for years with no follow up by the settlement agent. Agents are encouraged to keep timely and accurate reconciliations of their escrow accounts in order to keep funds from becoming stale or unidentifiable. At the minimum, reconciliations should be performed monthly.

If you have any real estate settlement related questions you may contact the Real Estate Settlement Agent Investigations Section at (804) 371-9465. If you have any questions regarding your license or appointment status you may contact the Bureau of Insurance, Producer Licensing Section at (804) 371-9631 or visit our website at <http://www.scc.virginia.gov/boi>.

Links to Title 55.1 Chapter(s) 9 and 10 and other related Virginia insurance laws and regulations are below.

<http://www.scc.virginia.gov/boi/pro/resa/stats.aspx>

The information provided is not meant to be all inclusive.