

Revisit: "What's In Your Escrow Agreement?" by Don McFadden

At the 2008 Fall Convention, as part of OLTA's commitment to independent title agents, I gave a presentation about escrow agreements. Escrow agreements are often overlooked and undervalued in the busy, independent title agency. Underwriters tend to shy away from dictating or discussing escrow agreement terms with their title agents because underwriters do not want to be the escrow agent's principal. Perhaps the slow down in the economy, the seasonal slow down and the beginning of a new year is a good time to ask your self: "What is in my escrow agreement?" Two September, 2008 Ohio cases reinforce the importance of reviewing your escrow agreement. Here's what you can do to expedite your review.

First, check out my article, PowerPoint presentation and pro forma escrow agreement posted on the OLTA website under the "Events & Programs" link at the top of the OLTA web, home page. Then scroll down to "THANKS FOR ATTENDING! 2008 ANNUAL CONVENTION." Click on the "Session Handouts" link and *voila!* While you are there check out the other handouts.

Second, take a look at *OC Property Management, L.L.C. v. Gerner & Kearns Co., L.P.A.*, (2008, 8<sup>th</sup> Dist., App., Cuyahoga County) 2008 Ohio 4709; 2008 Ohio App. LEXIS 3960. In the *OC* case, the trial court granted a motion to dismiss, an unusual, procedural, early victory for the escrow agent defending a breach of escrow claim. The 8<sup>th</sup> District, Court of Appeals affirmed saying that the "economic loss" rule prevents the plaintiff from suing the escrow agent for negligence. Basically the court is said that negligence is a tort. Tort damages involve injury to person or to property. Where, as in the *OC* case, the damages sought are only for economic losses, the claim must be in contract not in tort. If you are not getting this talk to your lawyer. The *OC* case is a great opinion for the title industry. Title agents acting as escrow agent should not be sued for negligence. The claim should be for breach of contract. Rob Holman was the successful lawyer in the *OC* case and did a great job.

Third, take a look at *Countrywide Home Loans, Inc., v. Huff*, (2008, 11<sup>th</sup> App. Dist., Trumbull County), 2008 Ohio 4974; 2008 Ohio App. LEXIS 4170. In *Countrywide*, Steve Elder skillfully uses the very same economic loss rule to win in the trial court on summary judgment and win again on appeal. The appellate court said: "The trial court properly determined that any duty owed by Fidelity to appellants arose by virtue of contract and the only claim against Fidelity sounds in tort. However, title insurance companies are not held liable in tort for claims by an insured regarding title searches, escrow, or closing matters." Fidelity's title policy contained the common, merger, status of title clause, which limits liability regarding any claim of loss or damage, whether or not based on negligence, to the title policy. The Plaintiff sought to recover for an alleged diminution in value and for economic damages. The appellate court held that: "the economic-loss rule precludes recovery in tort for purely economic losses." Learn from the underwriters who put language in their policies to limit their liability.

What this means is that the language in your escrow agreement is important. Limit your liability. Include a one year claims provision, a status of title clause, a merger clause, a bank failure clause, a no-fiduciary relationship clause, a water hold disposition clause and an arbitration clause. Talk to your counsel before changing your agreement. Stay out of the courthouse. But if you are sued, let your revised escrow agreement be your first witness to clearly and unambiguously limit your escrow liability.